No. 76-279

In the Supreme Court of the United States

OCTOBER TERM, 1975

PASQUALE CHARLES MARZANO,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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AUTHORITIES CITED

Cases

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Pasquale Charles Marzano, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Opinion Below

The opinion of the Court of Appeals, not yet reported, is appended to this petition, *infra* (majority, affirming, App. A; dissent, App. B).

Jurisdiction

The opinion of the Court of Appeals was entered on May 18, 1976, with a majority of the panel affirming. (Majority opinion, App. A; Dissenting opinion, App. B) Petitioner's petition for rehearing and suggestion for rehearing in banc, timely filed, was denied on June 28, 1976.* (App. C) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.**

Questions Presented

1. Were petitioner's Fourth Amendment rights violated by the improper admission of evidence illegally seized upon his arrest on Grand Cayman Island?

   A. Did the Court of Appeals apply an improper standard in concluding that the government activities did not constitute sufficient "involvement" in the actions of the foreign official to render the Fourth Amendment operative upon foreign soil?

   B. Does the result reached by the Court of Appeals resurrect a form of the constitutionally forbidden "silver platter" doctrine?

   C. In any event, is the FBI agents' taking of the evidence from the foreign official—without a warrant and without probable cause—an unlawful "seizure"; and is the court's conclusion—that there was no "seizure" because the official consented—spurious, since *petitioner* never gave consent?

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* Circuit Judge (formerly Chief Judge) Luther M. Swygert, who dissented from the majority's affirmance, voted to grant the petition for rehearing.

** Mr. Justice Stevens granted our motion for an extension of time within which to file this Petition.

2. Was petitioner deprived of his Sixth Amendment right to confrontation, his due process right to a fair trial, and his constitutional right to present defense evidence, where, in a case clearly insufficient absent informer and accomplice testimony, the court:

   A. Prejudicially limited petitioner's rights under the Sixth Amendment in testing the credibility of the government's chief witness (one, Gushi) by way of:

      (i) cross-examination, and

      (ii) impeachment (via attempts to reveal, through extrinsic evidence, facts demonstrating bias),

      which improper limitations also violated petitioner's right to present evidence; and

   B. Improperly limited defense counsel, *sua sponte*, both during cross-examination of Gushi and during counsel's closing argument, which tended to disparage petitioner's position and prejudicially precluded the jury from drawing permissible inferences favorable to petitioner?

3. Was the jury improperly instructed as to the federal jurisdictional element in those counts charging theft in violation of 18 U.S.C. 2113(b), in that:

   A. The instructions were inadequate in the factual context of the case; and

   B. The essential jurisdictional element was effectively removed from the jury's consideration, thus depriving petitioner of his right to trial by jury?

4. Was petitioner improperly subjected to multiple convictions and sentences for essentially a single transaction?

Constitutional Provisions and Statutes Involved

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to trial by . . . jury, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Count 1 charged a conspiracy in violation of 18 U.S.C. 371; no question is raised herein as to the construction or application thereof.

Counts 2 through 7 each charged a violation of 18 U.S.C. 2113(b), as follows:

> "(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; . . .
>
> (f) As used in this section the term 'bank' means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation."

Count 12 charged a violation of 18 U.S.C. 2314, as follows:

> "Whoever transports in interstate or foreign commerce any . . . money, of the value of $5,000 or more, knowing the same to have been stolen, converted . . ."

STATEMENT OF THE CASE

Petitioner, Pasquale Charles Marzano (hereafter, petitioner) was charged with five other defendants in a 12-count indictment (74 CR 806) with conspiracy to violate the bank theft statutes and to transport stolen money in excess of $5000 in interstate and foreign commerce, and with the substantive offenses in so doing.[1]

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[1] The other defendants and the counts charged against them in the indictment are: William Anthony Marzano, Count 1, conspiracy; Counts 2 to 7, theft of money in excess of $100 from 6 separate banks; Count 8, theft from all the banks named in Counts 2 to 7; Count 9, entering a building used in part as a bank with intent to steal money in excess of $100 belonging to the Merchandise National Bank of Chicago; Count 10, use of an explosive to commit bank theft; Count 11, damage and attempt to damage a building and personal property contained therein used in interstate commerce; and Count 12, transporting stolen money in excess of $5000 in interstate and foreign commerce.

Ralph Ronald Marrera was charged in all the above counts, except Count 12.

Luigi M. DiFonzo was charged only in the conspiracy Count 1 and in Count 12.

Peter James Gushi and James A. Maniatis were charged in the conspiracy Count 1, and in Counts 2 to 11 as aiders and abettors, and Gushi (but not Maniatis) was charged in Count 12 with transporting stolen money in interstate and foreign commerce. (App.

(Footnote continued)

Pretrial motions to dismiss the indictment on various grounds and to suppress evidence seized from defendants when arrested in Grand Cayman Island were denied. (App. 15) [2] Post-trial motions for acquittal or in the alternative for new trial were also denied. (App. 16)

An evidentiary hearing was held with respect to petitioner's motion to suppress evidence. (Tr. of Jan. 24, 1975)

(Footnote continued)

14) ("App." refers to the Appendix to petitioner's Brief in the Court of Appeals.)

Only petitioner and Luigi M. DiFonzo were tried by a jury. Just prior to trial, which commenced April 14, 1975, the government moved to dismiss Counts 8 and 9, and the court so ordered (over petitioner's objections as to the dismissal of Count 8). DiFonzo was found not guilty by the jury. Petitioner was found not guilty on Counts 10 and 11, but guilty on Counts 1 to 7 and on Count 12. (App. 15)

Maniatis pled guilty before trial, in December 1974, to Counts 1 to 8 inclusive and was sentenced to 18 months. (App. 15) Three days before the trial commenced, Gushi pled guilty on April 11, 1975 to Counts 1 to 12 (except 8) (App. 15); after the trial, he was sentenced to 4 years on Counts 1, 2 to 7, and 12, concurrent. (App. 16) William Anthony Marzano pled guilty before the start of the trial on April 14, 1975 to Counts 1 to 12 (except for 8 and 9) and was sentenced after the trial to a term of 5 years on Count 1, 7 years on Counts 2 to 7 and 5 years on Count 12, the sentences to run concurrent. (App. 16).

Petitioner was sentenced to 5 years on Count 1, 10 years on Counts 2 to 7, the sentences to run concurrent, and 10 years on Count 12, the sentence to run consecutive to the sentences imposed on Counts 1 to 7. (App. 16)

Defendant Ralph Ronald Marrera was severed because of a competency question as to him. (App. 15)

[2] "App." refers to the Appendix to petitioner's Brief filed in No. 75-1511 in the Seventh Circuit.

Statement of Facts *

The government's theory of a "bank"

The government did not allege that any of the six separately named banks in Counts 2 to 7 was burglarized, but that monies [3] were taken from the possession of the Purolator Securities Inc. premises at 127 W. Huron St., Chicago, alleged in the indictment to be an "agent" of the respective banks named in counts 2 to 7. (App. 4-9)

Inside Purolator

At about 1:00 a.m. on Monday, October 21, 1974, smoke was coming out of the closed and locked east vault of the Purolator Security Co., 127 W. Huron, Chicago, Illinois, at about which time the Chicago Fire Department was called. Indicted (but not tried) Ralph Marrera, the security guard at Purolator, and Mrs. Mildred Bivens, an alarm board operator, were the only persons on the premises [4]

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* A somewhat lengthy summary follows, rendered necessary so that this Court may consider the prejudicial impact of the Sixth Amendment errors asserted in Point 2, *infra*, in the context of the evidentiary posture of this case.

[3] The monies claimed to have been stolen are as follows (App. 4-9):

Count 2—Approximately $1,165,204 from Merchandise National Bank of Chicago.
Count 3—Approximately $562,610 from Central National Bank
Count 4—Approximately $66,500 from Exchange National Bank
Count 5—Approximately $378,850 from Ford City Bank
Count 6—Approximately $10,0000 from Peterson Motor Bank
Count 7—Approximately $19,000 from Metropolitan Bank and Trust Co.

[4] At her request, Marrera allowed Mrs. Angela Hughes, the previous board operator, to leave around 8:00 p.m. on Sunday, Oct. 20, 1974. Her regular quitting time was midnight. (Tr. 643, 653)

when the Fire Department was called. (Tr. 47, 626-29) He could not open the vault as he did not have the combination. (Tr. 47) About a half hour later, company Vice-President Russell Hardt arrived and opened the vault, (Tr. 49), at which time it was observed that heat and fumes filled the east vault. (Tr. 50) Some plastic bags filled with gasoline were found. (Tr. 50) Container boxes and tankers of money were pulled out of the vault, and monies were found missing.

Evidence technicians took samples of paint from the top of a tanker, (Tr. 140-51), which were found to be similar in color and characteristics to specks found in the Econoline van on Oct. 21, 1974. (Tr. 1172-73)

From one of the boxes (secured with a $4.00 lock, Tr. 626) that had been delivered to the First National Bank of Chicago sometime during Monday, October 21, 1974, it was shown that over one million dollars that had been collected at the Hawthorne Race Track, Cicero, Illinois on Saturday, October 19, 1974, (Tr. 595-97), was missing,[5] although the lock showed no signs of having been tampered with. (Tr. 620)

Various witnesses from various banks testified to their having money shortages.

The role of Purolator and the banks

Another Vice-President of Purolator Security, one Edward Buda, testified that his company had contracts with the banks named in the indictment to keep money for those respective banks and to act upon their directions. (Tr. 170-207) The Purolator Company considered the banks its

[5] No specific reference to this loss was made anywhere in the indictment.

customers. (Tr. 194) Purolator Security Inc. was not a bank and never functioned as a bank. (Tr. 194) Purolator charged its bank customers fees for services rendered. (Tr. 194-95) For such losses as occurred on October 20 and 21, 1974, Purolator was covered by an insurance policy, (Tr. 195), and the losses were paid.

(The court sustained the government's objection to the defense question whether Purolator was insured by the Federal Deposit Insurance Corporation in 1974. (Tr. 205))

Surveillance

Various agents of the Illinois Bureau of Investigation and of the Illinois Legislative Investigating Committee testified to having seen petitioner (called "Charles," by Gushi and Pollakov) in the company of Peter Gushi from time to time in September, 1974, and up to, but not later than, October 10, 1974. (Tr. 817, 820, 1054, 1858). An undercover informer, Martin Pollakov, working for the ILIC, had involved himself with Gushi in the operation of Gushi's Family Discount Store, Worth, Ill. to report on suspected fencing operations. Pollakov had brought into the discount center, Eddie Doyle, an agent for the ILIC and for the IBI, and he (Doyle) made such observations as he made and filed reports of his conversations with Pollakov in his capacity as an agent of those agencies. Pollakov would report to Doyle what Gushi said to him from time to time in September and October 1974. (Tr. 970, 976-77).

Testimony of Gushi and Pollakov

Gushi and Pollakov testified to petitioner's request to purchase an Econoline van, preferably white, although the final purchase was of a light green van. The $3900 cash for this purchase was put up by both petitioner and Gushi.

(Tr. 1209-10) The van was bought by James Maniatis in his name, but petitioner was seen to drive the van from time of purchase by IBI agents. He had on white gloves while driving the van, and even as he was working on it. (Tr. 910)

On an occasion, petitioner brought defendant William Anthony Marzano to Gushi's discount store in September. On another occasion in September, petitioner was seen with defendant Marrera at the Discount Store, and at Marrera's house. (Tr. 1011)

Gushi told Pollakov from time to time that a big "score" was going to come off on a Sunday in September, 1974. (Tr. 958) He told Pollakov that three Sundays from September 29, 1974 (which would make it October 20, 1974), he was going to be involved in one of the country's largest cash scores, and that as Gushi was tired of being poor and being broke, he was going into a building with rifles and carbines, that the money would come out in big burlap bags, and that petitioner would go in the building along with Gushi. (Tr. 958-59) Gushi further said that if any cop got in the way that he was going to take him out, and that they would also have to take four other guys out of the way.[6] (Tr. 975-76)

Gushi's Testimony: A.M. Monday, Oct. 21, 1974

Gushi testified that at a meeting in his home in Oak Lawn, Illinois on Saturday night, October 19, 1974, defendant DiFonzo, along with petitioner and William Marzano, were present; it was arranged that if petitioner would call on Monday morning at about 4:00 a.m. to suggest a

[6] To the questions as to whether or not they meant Gushi was intending to kill a cop, or what it meant to "put four guys out of the way," the court sustained the government's objections. (Tr. 975-76)

breakfast meeting, such would be a signal for them to meet at 95th and the Tollway at Hickory Hills, Illinois at about 5:30 a.m.. (Tr. 1213-14) Gushi testified he received such a call, and drove to the meeting place on Monday morning October 21, 1974 at about 5:00 a.m. with his wife. At the meeting place, Gushi testified DiFonzo drove up in his Lincoln Continental car dressed in a suit, petitioner drove up in the Econoline van, from which he took a suitcase and a valise which he gave to Gushi who then gave it to his wife with instructions that she take them home and leave them in the bedroom. (Tr. 1216) Gushi told his wife to have Maniatis pick up the van from the parking lot at Gushi's Family Discount Store. (Tr. 1216)

The Trip to Florida: A.M. & P.M. Monday, Oct. 21, 1974

Gushi then testified that petitioner drove the van to the discount store in Oak Lawn, and that he drove with William Marzano. Later, all four met; petitioner rode with William Marzano in the Ford and Gushi rode with DiFonzo in the Lincoln. (Tr. 1218-21) As the parties switched to get into the respective cars, Gushi said he asked petitioner how much money was left with Gushi's wife and petitioner answered about $400,000. (Tr. 1218) He then asked petitioner what they were carrying in the car, and petitioner answered about $1,000,000. (Tr. 1218-19)

As Gushi drove with DiFonzo through Indiana, and the two Marzanos were together in the Ford, DiFonzo asked Gushi if he were in on the score, and at first Gushi said "yes," but then said he wasn't. (Tr. 1219)

The travelers stopped for coffee at a restaurant in Indiana, after which Gushi continued to ride to Columbus, Ohio with William Marzano, and petitioner drove with

DiFonzo. Gushi asked W. Marzano how much was in the suitcases given to him, and Marzano said either "240,000 and 150; or you got 250 and 140." Gushi asked how much was in DiFonzo's car and William said "a million three hundred thousand." (Tr. 1225)

Events: Columbus, Ohio and Miami, Florida area: Monday and Tuesday morning, Oct. 22, 1974

Gushi testified that the original plans were to drive to Miami, Florida and then to take a boat, for which he had previously arranged, to Grand Cayman Island. On the drive down through Indiana, Gushi said they changed their plans and decided to charter a plane at Columbus, Ohio. They did so, and flew to Miami where they stayed in a hotel in the Miami area. The next morning, Tuesday, October 22, 1974, Gushi testified he saw a Florida newspaper with a headline "3.8 million theft" and showed it in the hotel room to petitioner, who said, "Look at the way they exaggerate; I wonder how much money they put in their pockets." (Tr. 1234). Later, petitioner said DiFonzo was taking the money by plane from Ft. Lauderdale to Grand Cayman. (Tr. 1235) Gushi decided he wanted to return to Chicago and not go to Grand Cayman. Petitioner told him to travel to Chicago, via New York, which he did. (Tr. 1240) William Marzano and petitioner bought plane tickets to Grand Cayman.

Gushi's solo events: Chicago, Oct. 22 to Oct. 30, 1974

Upon Gushi's return to Chicago at O'Hare Airport on Tuesday night, October 22, 1974, he met with John Valentino, a partner in (or owner of) his discount store. Gushi testified to a series of events including his arrest and release both by agents of the IBI and Chicago police on

Wednesday, October 23, 1974; and his eventual arrest on State charges with Maniatis for buying stolen watches at his discount store. He was released on bond ($10,000 of the monies taken from the valise or suitcase he gave to his wife was used for that purpose). He was then arrested by FBI agents on Monday night, Oct. 28, 1974. (Tr. 1257-58) He declined to talk to FBI agents Green and Ford who had arrested him, but requested that he talk to FBI agent John Oitzinger who flew in from New Mexico, (Tr. 1912), and who then took a series of statements from Gushi on October 30 and November 1, 1974.

Events in Grand Cayman Island: Oct. 30 and 31, 1974

As developed at the hearing on the Motion to Suppress (before the trial court on January 24, 1975), FBI agents traveled to Grand Cayman Island and showed to the Detective Superintendent of Police, pictures of petitioner and DiFonzo (Tr. 76, of Hrg. 1/24/75), on the basis of which Supt. Derrick Tricker located petitioner and DiFonzo as they were at the airport in Grand Cayman awaiting a plane for Costa Rica. DiFonzo had in his possession two round-trip tickets to Costa Rica and back in the name of "Stewart." (Tr. 83, of Hrg. 1/24/75). Monies were taken from their persons and suitcases. Petitioner had a bundle of $5,000 and another quantity of $4,955. (Tr. 1806-08) Government Exhibit 90-1 contained 7 $100 bills and Exhibit 90-2 contained 9 $100 bills seized from petitioner. DiFonzo was found with $1,287 and $11,780 in bills in his suitcase from which three $100 bills were removed and were contained in Government's Exhibit 91-1 and an additional 9 $100 bills contained in G.Ex. 91-2. (Tr. 1812) This money was seized by Supt. Tricker of the Grand Cayman Police on Oct. 30, 1975 and turned over to FBI agents on the Island on Oct. 31, 1974. (Tr. 41, of Hrg. 1/24/75). No

search warrant or other process was served upon either of the defendants.[7]

Two $100 bills from G.Ex. 91-1 and one $100 bill from G.Ex. 90-2 were identified by Hawthorne Racetrack employees as containing markings they placed thereon when the bills were counted by them at the track. (Tr. 1817; 1822; 1825-26) Other markings on $10 and $20 bills recognized by the track employees (Tr. 1827-37) were found on bills recovered by the FBI on Nov. 21, 1974 in the basement of a home in Chicago (Tr. 1619-31) owned by Marerra's grandmother. (Tr. 1619) [8]

Petitioner and DiFonzo were arrested and detained overnight on Oct. 30, 1974 and placed upon a plane to Miami on Oct. 31, 1974. FBI agents paid for their transportation and for the transportation of a Grand Caymanian policeman who accompanied the FBI agents and the prisoners on the plane to Miami. (Tr. 20, 25-27, 39, of Hrg. 1/24/75).

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Additional specific, separate facts pertinent to the arguments which follow are set forth within the respective Points.

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[7] More specific facts concerning petitioner's arrest on Grand Cayman Island are set forth at pp. 18-21, *infra*.

[8] The Hawthorne loss was not charged in the indictment; see fn. 4, *supra* and accompanying text.

REASONS FOR GRANTING THE WRIT

Introduction

Legal fiction had a field day on the day this case came down.

Seldom has substance so been outstripped by form.

• • •

The majority opinion so grossly deviates from established principles of appellate decision-making that it should not be permitted to stand as the law. In the interest of justice, this Court should choose to exercise its discretionary certiorari jurisdiction—both as the guardian of those precious constitutional rights given such short shrift by the majority, and in the exercise of its supervisory power over the federal courts. Serious questions are posed herein, not only as to whether petitioner's constitutional rights have been violated, but also as to the manner in which the majority has given these violations its imprimatur.

The majority's subjugation of substance to form strips from petitioner his protective mantle of substantive constitutional guarantees. The spurious grounds whereby this has been rationalized must be denounced and laid to rest, lest justice and fairness be naught but dim memories.

1.

Petitioner's Fourth Amendment rights were violated by the improper admission of evidence illegally seized upon his arrest in Grand Cayman Island. The majority's conclusion, that "the involvement of the Government agents in this case was too insignificant for them to be considered participants in the actions of the foreign police official,"* and thus, that the Fourth Amendment did not apply, perpetuates the worst kind of legal fiction. Certiorari should be allowed so that this Court may speak to the applicability of the Fourth Amendment on foreign soil to the actions of foreign police officials, where American instigation of such actions is undisputed—an issue which should be, but as yet has not been, resolved by the Court.

Petitioner moved to suppress the use as evidence of money and other items taken from his person and luggage upon arrest on Grand Cayman Island. Following an evidentiary hearing,[9] the court denied the motion. (R. 47, App. 15)

Over the strong dissent of Circuit Judge (formerly Chief Judge) Swygert,[10] the majority holds "that the involvement of the Government agents in this case was too insignificant for them to be considered participants in the actions of the foreign police official." (App. A, pp. 18-19)

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* App. A, pp. 18-19.

[9] The transcript of the evidentiary hearing on the motion to suppress is not contained in the consecutive paginated Transcript of Proceedings; rather, it is a separate volume, dated January 24, 1975, consisting of pages 1 to 123. All transcript references within this Point are to that volume. "R." refers to the Record on Appeal.

[10] The entire dissenting opinion, pp. 28-38 of the slip opinion, is set forth as Appendix B to this Petition.

Acknowledging the aptness of petitioner's characterization that "but for" the information provided by the FBI, petitioner never would have been arrested in Grand Cayman, (App. A, p. 18), the majority nonetheless holds that:

> "providing information to a foreign functionary is not sufficient involvement for the Government to be considered a participant in acts the foreign functionary takes based on that information." *Ibid.*

From this legal fiction,[11] it follows (per the majority) that there was no Fourth Amendment violation in the case at bar.[12]

But this is the view through the blinders; surely the overview is otherwise when seen through wide open eyes.

Crucial to the requisite factual determination—*i.e.*, was there such U.S. involvement as to activate the protection of the Fourth Amendment and exclusionary rule—is the origin of the idea to arrest and search an accused seeking to invoke the exclusionary rule. As is clear from the cases relied on by the trial court, (R. 47, pp. 10-11), and by the majority, (App. A, p. 18), the source of the motivating

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[11] Characterization, ours.

[12] It is well settled that the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens. *Reid* v. *Covert*, 354 U.S. 1 (1957) (Fifth and Sixth Amendments); *Balzac* v. *Puerto Rico*, 258 U.S. 298, 312-13 (1922) (due process) *Best* v. *United States*, 184 F.2d 131, 138 (1 Cir. 1950) (Fourth Amendment).

The sole determinative issue is whether the U.S. involvement renders operative the protections of the Fourth Amendment. The district court made no finding whether the FBI agents or Supt. Tricker had probable cause to arrest petitioner on the Island, and the majority assumes that neither Tricker nor the agents were aware of probable cause to arrest, search, or seize in connection with the Purolator matter. (App. A, pp. 16-17)

force to arrest and search is of pivotal moment. Each case, on careful factual analysis, turns on this fulcrum.

Obviously the Grand Caymanian arrest and search was illegal by Fourth Amendment standards. It was without a warrant (Tr. 24, 149-50), and the FBI did not represent to Tricker that any process for petitioner's arrest was outstanding in the United States. (Tr. 24) Nor was there probable cause for arrest without warrant; indeed, the courts below make no finding of probable cause, but rest their decisions entirely on the erroneous conclusion that Fourth Amendment standards were inapplicable for lack of U.S. involvement. (R. 47, pp. 3, 9-11; App. A, pp. 16-20) [13]

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[13] But as Judge Swygert notes, "The stark facts show otherwise." (App. B, p. 36).

The testimony at the hearing on the motion to suppress demonstrates that from initial investigation to petitioner's arrest and search, and through his departure from Grand Cayman Island to Miami, Florida, there was ample U.S. participation by the FBI, such as to render the search and seizure "federal action" governed by the Fourth Amendment and the exclusionary rule. The trial court's finding of fact that no such U.S. participation was shown—that the U.S. agents "were mere observers," (R. 47, p. 3)—is manifestly incorrect.

Grand Cayman Detective Superintendent Derrick Tricker was first informed of petitioner's existence by the FBI on October 30, 1974. (Tr. 6)

The FBI told Tricker that they wanted him to help them find petitioner in connection with a 4.3 million dollar larceny in the United States. (Tr. 24, 69, 76) The FBI supplied Tricker with photographs of petitioner. (Tr. 24, 76) These photographs—furnished by the FBI—were utilized in Tricker's search for petitioner; indeed, without the photos, it is hard to conceive that Tricker could have found petitioner. (See Tr. 78-79, 81-82, 91, 140)

Two FBI agents were present when petitioner was arrested at

(Footnote continued)

Judge Swygert's compelling dissent (App. B) sets forth and relies upon pertinent portions from the transcript of the hearing on the motion to suppress. (See App. B, pp. 28-33.) While the majority still saw fit to accept the factual

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(Footnote continued)

the Grand Cayman airport by Tricker, as petitioner was at an airport departure area about to depart on a plane for Costa Rica; petitioner's luggage, in fact, was already on the plane when he was arrested. (Tr. 20) Petitioner was then transported to Tricker's office and searched by one of Tricker's officers. FBI agents were present during the search of petitioner and his luggage, (Tr. 52, 106, 116, 154), pursuant to FBI Agent Pieroni's specific request to be present. (Tr. 85) The FBI looked at items taken from petitioner during the search. (Tr. 22) The FBI helped inventory items taken from petitioner's person and luggage. (Tr. 111, 156) Tricker turned over to FBI Agent Farrell money seized from petitioner, which was suspected to be fruits of the crime. (Tr. 41, 93, 96) At no time did Tricker consider giving the seized property back to petitioner rather than to the FBI. (Tr. 42)

The FBI's own belief that the U.S. was involved is evident from that fact that the agents desired to warn petitioner of his constitutional rights. (Tr. 84-85, 142)

The FBI rode with petitioner to the airport the next morning, October 31, 1974, in the same police car. (Tr. 26, 50, 160) The FBI supplied and paid for petitioner's plane ticket to Miami. (Tr. 39, 110, 128-29) Petitioner was not permitted to use the ticket for Costa Rica taken from him during the search, (Tr. 90, 92, 109-10, 159), nor was he given the option to leave on any plane other than the one bound for Miami. (Tr. 35) Petitioner was still under Grand Cayman arrest—clearly, he was not free to leave—when Tricker and the FBI transported him to the plane for Miami. (Tr. 38) Petitioner had spent the night of October 30, 1974, in the Grand Cayman prison lockup. (Tr. 38) The FBI paid the air fare for a Grand Cayman police officer to accompany petitioner on the flight to the United States. (Tr. 27, 39, 10) The FBI flew back with petitioner to Miami. (Tr. 25, 98-99, 162).

Significantly, no Grand Cayman charges ever were filed. (Tr. 21, 30, 55) (End of Footnote 13.)

findings of the district court,[14] Judge Swygert concluded—from the same record—that those findings were clearly erroneous:

> "The trial judge clearly erred in finding that the FBI 'played little or no part in the return of the defendants to the United States, . . . that on no occasion did agents of the F.B.I. actively involve themselves in the process whereby the defendants returned to the United States, [and] . . . . The agents throughout the time in question were mere observers.' Rather, the evidence is manifestly clear that the agents were not mere observers. They *actively instigated* the search for DiFonzo and Marzano on the island, and *they participated, in any real sense of that term,* in the search for the defendants, their arrest, the search and seizure, and in their return to the United States." (App. B, p. 35; footnote omitted; emphasis added.)

Grasping the realities, Judge Swygert continues:

> "The defendant is correct in arguing
>
> But for the instigation of the FBI, defendant would never have been arrested and searched on Grand Cayman Island.
>
> But for the aid of the FBI in supplying Tricker with defendant's photograph, no arrest could have been made.
>
> But for the presence of the FBI and information supplied by the FBI, the local authorities would not have seized defendant's personal property (including money, plane ticket, personal papers) and refused to return it to defendant.
>
> A reading of the testimony of Superintendent Tricker and Agents Pieroni and Farrell leaves the indelible impression that these three at the hearing made a deliberate, studied effort to place the responsibility

[14] "We must accept the factual findings of the district court on this issue unless they are clearly erroneous." (App. A, p. 17)

> on Tricker for the arrest, the search and seizure, and the return of the defendants and to disassociate the FBI agents from the adventure. The stark facts show otherwise." (App. B, pp. 35-36, quoting from Def. Br. p. 76.)

Though the exclusionary rule may be judicially engrafted, (App. A, pp. 20-21), it is for that reason no less a part of the Constitution than if it were originally written therein. See *Mapp* v. *Ohio,* 367 U.S. 643 (1963).[15] As noted by Judge Swygert, (App. B, p. 38), the majority's decision "allows foreign officials to hand evidence against the defendants to federal agents on a 'silver platter.'"[16]

In essence, the majority permits the government to have its cake and eat it, too.

The government is treated as private citizen abroad, when it suits the government; yet it has what amounts to governmental immunity from any challenge to its conduct.

[15] "[T]he exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . ." *Id.* at 657.

[16] See *Elkins* v. *United States,* 364 U.S. 206 (1960), invalidating the use in federal criminal trials of evidence seized by State officials, (not then subject to the Fourth Amendment), under such circumstances that, had they been federal agents, their conduct would have violated the Fourth Amendment. Clearly the foreign official of today stands in shoes equivalent to those of the pre-*Elkins* (and pre-*Mapp*) non-federal governmental official; and just as clearly, it seems to us, the rationale of *Elkins* must forbid use in a federal criminal trial of evidence obtained by a foreign official in such a manner that, had he been a U.S. agent, the Fourth Amendment would have been violated.

And even if a strict anti-"silver platter" rule be rejected, still principles of justice and fairness dictate that the realities of U.S. involvement must govern the crucial issue whether or not the Fourth Amendment applies.

Imagine, if you will . . .

The cast of characters consists of citizens, criminally bent on kidnapping. They say and do exactly what the FBI agents and Supt. Tricker said and did,[17] minus only any reference to wanting petitioner for purposes of arrest and criminal prosecution. Later, they are indicted for kidnapping petitioner and for conspiracy so to do. Under prevailing practice, does anyone doubt that all would be held criminally responsible for the actual deeds of Citizen Tricker, although the U.S. citizens "merely" supplied the photographs and paid the plane fares?

Were you a U.S. attorney, would your conspiracy count not include—as "overt acts" in furtherance of the conspiracy—that the U.S. citizens supplied the photos and paid the fares?

Clearly, criminal liability would attach.[18]

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[17] See footnote 13, pp. 18-19, *supra*, for factual details.

[18] If the FBI agents and Tricker (hypothetically) were charged with criminal conspiracy under U.S. law—*i.e.*, if they had acted together as under the demonstrated facts, but to commit an offense, rather than to arrest and search petitioner, the FBI instigation and assistance shown here would be more than ample to sustain conviction. Indeed, in criminal cases, reviewing courts are quick to note that no express agreement need be found, and that the existence of a tacit agreement sufficient to sustain conviction may be inferred from the acts of the parties, see, *e.g.*, *United States* v. *Varelli*, 407 F.2d 735 (7 Cir. 1969), and juries are routinely so instructed in conspiracy trials. See, *e.g.*, the conspiracy instructions in this very case (Tr. 2236-39) and in 1 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, Inst. No. 28.04, at 434, incorporating Inst. No. 23.07, at 365-66 (esp. par. 3, at 365) (2d ed. 1970). Even if a "joint venture" in the strict sense, as would be required by the majority in *Stonehill* v. *United States*, 405 F.2d 738 (9 Cir. 1968), (relied upon below, App. A, p. 18), must be shown to require suppression of evidence from a foreign search, surely such joint venture

(Footnote continued)

Sheer folly that the Fourth Amendment has not.

Based upon all the foregoing, the facts adduced at the hearing on petitioner's motion to suppress showed more than sufficient federal involvement in the arrest and search of petitioner on Grand Cayman to render applicable the exclusionary rule to enforce the protection of the Fourth Amendment.

We urge that upon the facts here shown, even existing law as relied upon by the majority[19] would dictate suppression of the evidence thus seized. But to the extent that that line of Ninth Circuit cases arguably supports admission of such evidence, it is time for this Court to step in.

Certiorari should be granted, and, upon consideration of this issue, the Court should conclude that, based upon a proper standard, the trial court erred in denying the motion to suppress, and petitioner's Fourth Amendment rights were violated by admission of the evidence.

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Assuming, *arguendo*, that there was no U.S. participation with regard to petitioner's initial arrest and the

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(Footnote continued)

as is necessary to call forth the Fourth Amendment cannot require more proof than that required to establish a joint venture or conspiracy to support a federal conviction.

Similarly, joint venture principles as incorporated into the law of accountability would render the FBI agents criminally liable as aiders and abettors—at the very least—of Tricker's conduct, if that conduct constituted a crime. See, *e.g.*, *United States* v. *Greer*, 467 F.2d 1064, 1069 (7 Cir. 1972); *United States* v. *Bradley*, 421 F.2d 924, 927 (6 Cir. 1970).

Not insignificantly, the majority has failed to deal with this substantial contention.

[19] *E.g.*, *Stonehill* v. *United States*, 405 F.2d 738, 743-46 (9 Cir. 1968), in App. A, p. 18, and additional cases there cited.

search and seizure of petitioner's person and luggage, there is no doubt that there was U.S. governmental action in FBI Agent Farrell's seizure of approximately $23,000 (handed to him by Tricker) without a warrant, while petitioner was still in official custody. (Tr. 41, 93, 96) Part of this money and other items seized belonged to petitioner,[20] and Agent Farrell's seizure thereof prevented the property from being returned to him.

Farrell accepted and retained—*i.e.*, seized—the money turned over to him by Grand Cayman police. The thrust of this alternative aspect of petitioner's argument is directed, not at Tricker's initial taking of the property from petitioner, but rather, at the U.S. agent's taking custody thereof from the Grand Cayman officials. The Fourth Amendment, of course, prohibits not only unreasonable searches, but unreasonable seizures as well. *Terry* v. *Ohio*, 392 U.S. 1, 16-17 (1968). Thus, it is the U.S. agent's action in accepting the property, not the search by foreign officers, that is here in dispute.[21]

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[20] Actually, some $9,300 was taken from petitioner's possession, and the remaining money was taken from DiFonzo. (Tr. 40, 88)

[21] This seizure of petitioner's property violated his constitutional rights as protected by the Fourth Amendment.

A seizure conducted outside the judicial process, *i.e.*, without a warrant, is *per se* unreasonable in violation of the Fourth Amendment. *Katz* v. *United States*, 389 U.S. 347, 357 (1967). While this rule is subject to limited and well-defined exceptions that may justify a warrantless search and seizure, the exceptions are "jealously and carefully drawn," *Jones* v. *United States*, 357 U.S. 493, 499 (1958), and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." *McDonald* v. *United States*, 335 U.S. 451, 456 (1948). See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-55 (1971).

The seizure here was not pursuant to any of the recognized ex-

(Footnote continued)

The majority inappropriately has responded that this issue is concluded because *Tricker* consented. (App. A, p. 20) Whether or not Tricker consented is irrelevant; the agents' taking of the property renders it a "seizure" for Fourth Amendment purposes, and *petitioner*—the only one whose consent could be relevant—did not consent.

• • •

The sheer fiction of the majority's position becomes apparent in yet another aspect of the Fourth Amendment issue. In discounting FBI "involvement," and attempting to portray the arrest of petitioner as solely Tricker's activity, the majority states:

> "He [Tricker] testified that the defendants had a choice about going to Miami but that he did not tell them so and that if the defendants had indicated that they wanted to go somewhere other than Miami, he would have to 'review the situation.'" (Sl. Op. pp. 17-18, App. A, pp. 17-18)

Need we say more?

Because of the impact of the majority's decision upon the rights of U.S. citizens abroad, vis â vis the degree of immunity which U.S. agents can conjure up, this Court should determine this question rather than permitting the majority's feat of prestidigitation to stand as law.

(Footnote continued)

ceptions to the warrant requirement, *i.e.*, (a) incident to arrest, (b) plain view, or (c) exigent circumstances.

The FBI's seizure of the money and other property was not incident to a lawful arrest. These agents did not have authority to make an arrest on Grand Cayman Island (Tr. 52, 77); moreover they specifically denied that they arrested petitioner. (Tr. 104, 153)

Nor was the seizure either inadvertent or permissible under the doctrine of exigent circumstances. See *Coolidge* v. *New Hampshire*, *supra*, at 469; *United States* v. *Sokolow*, 450 F.2d 324 (5 Cir. 1971).

2.

Petitioner was deprived of his Sixth Amendment right to confrontation, his due process right to a fair trial, and his constitutional right to present defense evidence, where, in a case clearly insufficient absent informer and accomplice testimony, the court:

A. Prejudicially limited petitioner's rights under the Sixth Amendment in testing the credibility of the government's chief witness (one, Gushi) by way of:

(i) cross-examination, and

(ii) impeachment (via attempts to reveal, through extrinsic evidence, facts demonstrating bias),

which improper limitations also violated petitioner's right to present defense evidence; and

B. Improperly limited defense counsel, sua sponte, both during cross-examination of Gushi and during counsel's closing argument, which tended to disparage petitioner's position and prejudicially precluded the jury from drawing permissible inferences favorable to petitioner.

The Seventh Circuit's decision conflicts with decisions from other Circuits and with principles announced by this Court in Davis v. Alaska, 415 U.S. 308.

A.

Peter Gushi was the essential prosecution witness; in order to convict defendant of any charge in the indictment, the jury had to believe Gushi.[22] Indeed, Gushi's credibility was the central issue in this lengthy trial.

[22] See evidentiary facts set out at pp. 7-14, *supra*. Gushi's testimony, summarized at pp. 9-13, *supra*, clearly is essential.

A defendant has a constitutional right during cross-examination to demonstrate the interest, bias and motive of a prosecution witness. *Davis* v. *Alaska*, 415 U.S. 308 (1974).[23]

He had already pled guilty to charges under the same indictment, and was awaiting sentence at the time he testified against petitioner. (Tr. 1176)

Since Gushi was an "accomplice" witness (so denominated by the government, Tr. 1923), and clearly, the essential government witness, petitioner had a right searchingly to cross-examine him concerning his motives for testifying, including delving deep into the questions of bias and prejudice which might have influenced his testimony. Petitioner had a right to have the jury fully cognizant of any and all factors which reasonably might have affected their determination of Gushi's credibility.

[23] In *Davis* v. *Alaska*, *id.* at 316-17, this Court stated:

"A more particular attack on the witness' credibility is effected by means of cross examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore Evidence §940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross examination.

"Petitioner was thus denied the right of effective cross examination which '"would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart* v. *Janis*, 384 U.S. 1, 3 [16 L. Ed. 2d 314, 86 S. Ct. 1245].' *Smith* v. *Illinois*, 390 U.S. 129, 131, 19 L. Ed. 2d 956, 88 S. Ct. 748 (1968)."

However, the trial court impermissibly restricted the defense, both in cross-examining Gushi, and in presenting extrinsic evidence (through other witnesses and evidence), in efforts to impeach him. The panel has approved.

The Restrictions

(i) Cross-examination

Petitioner attempted to demonstrate, through questions put to Gushi on cross-examination, facts from which the jury could infer his bias in favor of the government.

These proper defense attempts were thwarted by restrictive rulings by the court which prevented petitioner from demonstrating:

1. That Gushi was hopeful that if others go to jail because of his testimony, he would not go to jail, (Tr. 1463);
2. Circumstances under which Gushi's bond was reduced from $1,000,000 to $50,000 (Tr. 1402-03).

On Cross-Examination

Gushi was asked where his release on bond on March 6, 1974 took place (Tr. 1402); (objection, sustained); whether the money that was put up for bond was put up in the U.S. District Court in Chicago; (objection, sustained) (Tr. 1402); whether his attorney was present with him at the time the motion was made in court to reduce the bond; (objection, sustained). (Tr. 1403)

No showing was made by the government why Gushi should not answer those questions which, if answered, might provide clues for further interrogation on the considerate treatment by the government in not opposing a reduction from $1,000,000 bail to $50,000 bail. These restrictions clearly were violative of petitioner's Sixth Amendment right of confrontation. *Smith* v. *Illinois,* 390

U.S. 129 (1958); *Alford* v. *United States,* 282 U.S. 657 (1931); *United States* v. *Lyon,* 397 F.2d 505, 511 (7 Cir. 1968). See also *United States* v. *Garafolo,* 395 F.2d 200 (7 Cir. 1967), *rev. per curiam,* 390 U.S. 141, 144 (1968), where the court erroneously sustained the government's objection, thereby preventing the defense from learning the address of the witness.

Somewhat similar limitations on cross-examination were stricken down in *United States* v. *Varelli,* 407 F.2d 735, 749-57 (7 Cir. 1969):

> "While counsel for defendants were able to bring out that Schang was receiving special treatment (his bond had been reinstated), they were precluded from further inquiry." *Id.* at 750-51, citing *Alford* and *Smith, supra.*

In *Varelli,* as in *Alford, Smith* and *Garafolo,* the limitation in cross-examination went to an attempt to learn the witness' address.

In the case at bar, we were precluded from probing into the "special treatment" regarding the bond issue.

Petitioner attempted to adduce, through questions put to other witnesses, evidence pertinent to the issue of Gushi's bias. The court's rulings, preventing these proper attempts to demonstrate Gushi's bias through the use of extrinsic evidence, precluded the jury from being cognizant of the following:

1. That government attorneys had knowledge that Gushi had threatened a government witness and his family—a federal offense—for which no official action was being taken against him. (Tr. of Pr. 10/29/74 at Marrera bond hearing before Hon. A. L. Marovitz, mag. # 74 M 942; App. 18.)
2. That the authorities were aware of still other offenses committed by Gushi for which he was

not being prosecuted. (Tr. 1275-76, 1277, 1281, 1283, 1284-85, 1286, 1299) [24]

Although the court did not allow all of the questions put to Gushi on cross-examination designed to show his bias, prejudice, interest and motive for testifying falsely—which is error of a different stripe—the court did permit some questioning regarding Gushi's criminal activities, which Gushi denied. Having laid a proper foundation, defense counsel was obligated to impeach by refuting the denials. As a matter of fact, with respect to the implications in the questions asked, defense counsel had made an opening statement to the jury in which he advised that, for example, Gushi was involved in the theft of some $13 million worth of securities. (Tr. 32)

Rebuttal was available in the form of the undercover informer Martin Pollakov, by virtue of his statements as to what Gushi was confessing (albeit, unknowingly). Yet, not only did the court preclude the impeachment of Gushi except in one area, (the Gushi denial of the confessional that he ice-picked to death a man by the name of Tony), the court stated he was permitting such impeachment "more to rehabilitate the lawyer than for any other reason." (Tr. 1874-75). The court would not permit any impeachment on the 13 million dollars stolen securities statement obtained by Pollakov, nor to the fact that Gushi stated, upon his return from New York in September, 1974, that he was carrying 20 years in his suitcase. (Tr. 1872) Gushi was pointedly asked these questions and denied making the statements to Pollakov. (Tr. 1306; 1299)

Prior to Pollakov's testifying in the case in chief, the court set down severe limitations on the prospective cross-examination. Petitioner could not inquire of Pollakov re-

[24] Additional instances of improper limitation of cross-examination and extrinsic impeachment are set out in a lengthy footnote to our Brief below, fn. 6, pp. 16-27; these specifically will be cited to this Court if certiorari is allowed.

garding Gushi's confession to him to a murder of one Tony, by means of an ice pick, (Tr. 933), although the State authorities learned about such confession on September 28, or September 29, 1974 (Agent Doyle's report of Pollakov's statements re Gushi), and presumably, the government learned about it later.

We were not permitted to inquire of Pollakov regarding Gushi's statement to him that Gushi was going to New York a number of times to try to dispose of $13 million worth of stolen securities which Gushi said he had, (Tr. 933), or that on one occasion, on Oct. 6, 1974, Pollakov was told by Gushi that he had 20 years with him in a suitcase and when Pollakov asked Gushi what that meant, Gushi said it meant that he was transporting stolen securities. (Tr. 934) The court indicated that impeachment was proper only after Gushi testified. "Until there is a witness, there is nothing to explore, is there?" (Tr. 935)

But even after Gushi testified and denied the accusations implicit in the questions with respect to 13 million dollars of stolen securities or that he made such a statement to Pollakov (Tr. 1320), or that he was carrying 20 years in a suitcase (Tr. 1307), the court would not permit the defense to impeach the Gushi denials through Pollakov. (Tr. 1875)

Defense counsel objected to the limitation of the necessary impeachment inquiry (Tr. 1875), although he abided by the court's "ground rules." (Tr. 1875)

Precluding the jury from hearing this was prejudicial for the additional reason that in defense counsel's opening statement, the court overruled the government's objection to anticipated proof of other offenses by Gushi. (Tr. 31) Hence, the jury expected to hear such proof; thus, that the restrictions prevented this was all the more prejudicial.

An even more serious error was the court's preclusion of any inquiry to Gushi or to Pollakov, before the jury, as

to whether Gushi had threatened the government witness and his family *in this very case.* The Assistant U.S. Attorney had so represented to the emergency judge when he opposed the setting of a reasonable bail as to the defendant Marrera on Tuesday, October 29, 1974.[25]

The prosecutor, as an officer of the court, represented to the emergency judge:

> ". . . and there is another factor, your Honor—a co-defendant in this case, a Mr. Peter Gushi has since been apprehended.
>
> *"There are death threats involved in this case, your Honor on behalf of the defendants, by Mr. Gushi, to the wife and small children and the person of a government witness involved in this case who was, they anticipated, to be a witness and his life and the life of his family have been threatened to keep him in line in connection with this case, to prevent his testifying and providing information."* (Tr. Oct. 29, 1974, p. 5, before the Hon. A. L. Marovitz, U.S. v. Marrera, Mag. #74 M 942; App. 18)

Moreover, when defendant attempted to demonstrate facts pertinent to Gushi's credibility through questions put to Pollakov, the court improperly required defense to put the questions to Pollakov first outside the jury's presence. (Tr. 1866)

The Foregoing Limitations Were Improper, Depriving Defendant of his Sixth Amendment Right to Confrontation, his Right to a Fair Trial, and his Right to Present Defense Evidence.

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[25] Gushi had not become the cooperative witness yet, although he had been arrested by FBI agents in Chicago on Monday night, Oct. 28. He was awaiting the arrival of FBI agent Oitzinger from Arizona. (Tr. 1912) Gushi's statements to the FBI commenced on Oct. 30, 1974. (Tr. 1437-38)

This Court has held that effective cross-examination of a crucial prosecution witness, including questions designed to demonstrate bias or motive in testifying (which might affect the jury's view of his credibility), is guaranteed by the Sixth Amendment. *Davis* v. *Alaska,* 415 U.S. 308, 315-18 (1974):

> "[W]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* at 315-16.
>
> ". . . [T]o make any such inquiry effective, *defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility could appropriately draw inferences relating to the reliability of the witness.* Petitioner was thus denied the right of effective cross-examination which ' "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." . . .' " *Id.* at 318. (Emphasis added.)

The Seventh Circuit herein has overlooked a most important principle of cross-examination: that is, that what is relevant is not necessarily what the facts actually may have been, but rather, *what is paramount is what the witness believed,* vis â vis how his state of mind might affect his credibility. Defendants have a constitutional right to have the jury made aware of the witness' state of mind as to the factual circumstances in question, so that the jury may properly take this crucial factor — *i.e.,* the witness' state of mind—into consideration in determining his credibility.

In analogous situations, courts consistently have held that even absent any express promises of leniency from the prosecution to the witness, a defendant has a right to inquire of a prosecution witness whether he believes his giving testimony against defendant will benefit him, wheth-

er or not any such hope or belief has any foundation in fact, and even if such hope or belief is unreasonable. For example:

> "Whether or not a promise was actually made by the Assistant United States Attorney was irrelevant; the crucial factors were the witness' motive, state of mind and expectation in testifying." *United States* v. *Dickens,* 417 F.2d 958, 960 (8 Cir. 1969).

Because the reviewing court found that the witness' belief, if made known to the jury, "might well have affected the jury's view of . . . [the witness'] credibility," *id.* at 961, the court reversed, holding: "[W]here the Sixth Amendment right of cross-examination has been abridged, prejudice need not be shown . . ." *Ibid.* Other cases clearly holding that the relevant question is the witness' motive and state of mind, regardless of any factual basis for his entertaining any hopes or expectations of leniency, and reversing for improper limitation of questions designed to expose this, include: *Sandroff* v. *United States,* 158 F.2d 623, 629 (6 Cir. 1946); *Farkas* v. *United States,* 2 F.2d 644, 647 (6 Cir. 1924); *Spaeth* v. *United States,* 232 F.2d 776 (6 Cir. 1965) (defendant entitled to develop witness' *mere hope* of early parole).

This rule expressly has been extended to situations involving crimes not actually charged but which the witness *may have* committed. *Whitton* v. *State,* 479 P.2d 302, 316-18 (Alaska 1970). There, "The court would not permit [defense] counsel to inquire as to Daniel's involvement in *other crimes that may have been committed.*" *Id.* at 316. (Emphasis added.) The Alaska Supreme Court reversed, holding that this limitation of cross-examination of Daniel, a crucial prosecution witness, was prejudicial error, notwithstanding the general rule that a witness' prior misbehavior not resulting in conviction cannot be used to impeach. The court ruled that the prohibition of impeachment by proof of particular wrongful acts did not bar the use of such evidence for the purpose of showing bias:

> "What counsel wanted to show was that Daniel expected immunity from prosecution for *possible crimes he may have committed* in exchange for his willingness to give incriminating testimony against appellant." *Ibid.* (Emphasis added.)

Other cases specifically holding that a prosecution witness must be subject to unrestricted impeachment by demonstration of the witness' hope or belief that his testimony may operate to his benefit vis à vis charges against him (not directly related to the charges for which defendant is on trial), and reversing where defense attempts so to do were improperly limited, include: *Hughes* v. *United States,* 427 F.2d 66 (9 Cir. 1970); *United States* v. *Masino,* 275 F.2d 129, 131-32 (2 Cir. 1960) (reversed for improper restriction of cross-examination *re* the witness' hopes concerning an unrelated state charge); and *United States* v. *Leonard,* 494 F.2d 955, 962-63 (D.C. Cir. 1974).

The rationale requiring reversal in such situations applies equally to the case at bar, even though no actual prosecution (other than for the instant case itself) was pending against the witness, since Gushi may reasonably have *believed* that he was subject to possible prosecution for as yet uncharged offenses from which his testimony would cause him to be "spared." As is abundantly clear from the foregoing case law, the witness' belief, not the actual facts, determines the possibly impeaching effect of his state of mind upon his testimony.[26]

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[26] Nor does the non-federal nature of the crime in question remove this situation from the rule of the authorities above set forth. See *United States* v. *Masino,* 275 F.2d 129, 131-32 (2 Cir. 1960); *Stevens* v. *People,* 215 Ill. 593, 74 N.E. 786, 788-89 (1905). This is particularly true where—as here—both federal and State charges were being pressed against Gushi on the basis of his participation in the Purolator theft.

Moreover, it is for the jury alone to assess the impeachment value of purported impeachment evidence. In the words of this Court:

> "[D]efense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility could appropriately draw inferences relating to the reliability of the witness." *Davis* v. *Alaska,* 415 U.S. 308, 318 (1974).

Accord, United States v. *Borelli,* 336 F.2d 376, 391-92 (2 Cir. 1964); *United States* v. *Partin,* 493 F.2d 750, 759 (6 Cir. 1974) ("Its impact, if any, upon his credibility was for the jury, not for the prosecutors or the Court."); *United States* v. *Fontana,* 231 F.2d 807, 809-12 (3 Cir. 1956).

Even though some questioning along the lines sought by the defense was permitted, petitioner must, at the very least, be afforded a new trial because the jury was not exposed to all the avenues—including *the state of mind of the most crucial government witness* concerning his hope to avoid possible prosecution—which the jury may have found pertinent to the witness' credibility and to his full and complete reasons for "cooperating" with the government. Where a crucial witness is concerned, such limitation of full impeachment is reversible error even though some impeachment was permitted. See, *e.g., United States* v. *Gerard,* 491 F.2d 1300, 1304 (9 Cir. 1974); *United States* v. *Baker,* 494 F.2d 1262, 1266-67 (6 Cir. 1974); *United States* v. *Persico,* 305 F.2d 534, 537-40 (2 Cir. 1962); *Wynn* v. *United States,* 397 F.2d 621, 623-24 (D.C. Cir. 1967); *United States* v. *Hibler,* 463 F.2d 461, 462 (9 Cir. 1972).

In the case at bar, therefore, the court's restriction of petitioner's efforts to question Gushi on cross-examination as to his hopes of avoiding incarceration, (Tr. 1463), clearly was improper and prejudicially erroneous. And similarly, the defense should have been permitted to explore the circumstances surrounding Gushi's bail reduction, (Tr. 1402-05), not only for the reasons already stated, (pp. 28-29, *supra*), but also as those circumstances reflected his state of mind vis â vis his hopes and expectations. *United States* v. *Varelli,* 407 F.2d 735, 750 (7 Cir. 1969); see cases and discussion at pp. 33-36, *supra.*

Nor need proof of bias be confined to cross-examination; clearly, when dealing with the crucial and key witness—as here—his motivation for testifying and bias in favor of the prosecution or against petitioner may be demonstrated by extrinsic evidence, despite the usual rule prohibiting extrinsic impeachment on collateral matters, because:

> "[T]he bias or interest of a witness is not a collateral issue." *United States* v. *Shennault,* 429 F.2d 852, 855 (7 Cir. 1970).

Accord: Villaroman v. *United States,* 184 F.2d 261, 262 (D.C. Cir. 1950); see Hale, *Bias as Affecting Credibility,* 1 HASTINGS L.J. 1, 1 (1950); Hale, *Specific Acts and Related Matters as Affecting Credibility,* 1 HASTINGS L.J. 89, 97 (1950).

Where, as here, the witness allegedly made prior inconsistent statements to an agent, the proper procedure is to call the agent to lay a foundation. *United States* v. *Amabile,* 395 F.2d 47, 50 (7 Cir. 1968),[27] citing and relying on *United States* v. *Borelli,* 336 F.2d 376, 391 (2 Cir. 1964) ("counsel's only recourse would be to call the agent").

That is precisely what counsel attempted to do in the case at bar, by questioning Pollakov as to statements Gushi denied having made to him. (Tr. 1872) The trial

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[27] No issues in the subsequent history of *Amabile, i.e.,* 394 U.S. 310, 432 F.2d 1115 (7 Cir. 1960), are here pertinent.

court's thwarting of these efforts by refusing to permit the defense to present such extrinsic evidence tending to show Gushi's bias, motive, etc. goes against the mandate of the foregoing cases.

Moreover, it is proper to establish through extrinsic evidence facts providing a basis for establishing bias of a witness, even absent the witness' flat denial of having made any prior inconsistent statement. See *Bush* v. *United States,* 267 F.2d 483, 488-89 (9 Cir. 1959); *Williamson* v. *United States,* 310 F.2d 192, 198-99 (9 Cir. 1962); *Smith* v. *United States,* 283 F.2d 16, 19 (6 Cir. 1960).

And the restrictive errors as to Gushi were further aggravated by the court's insistence that defense counsel question Pollakov, for purposes of extrinsic impeachment, outside the jury's presence as to statements Gushi allegedly had made to him. (Tr. 1886) See *United States* v. *Bohle,* 445 F.2d 54, 72-75 (7 Cir. 1971).

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Violation of Right to Present Defense Evidence

In the case at bar, there was yet another reason why the improper restriction of cross-examination and extrinsic impeachment of Gushi was prejudicial to petitioner, over and above his right to present evidence of Gushi's bias and motive to testify falsely: By the evidence which petitioner attempted to and reasonably expected to elicit via some of the questions put to Gushi, petitioner would have—but for the improper restrictions imposed by the court—adduced *evidence in support of one of his theories of defense,* that is, that he had no knowledge of the source of the money in question. The questions put to Gushi regarding his various "scores" unrelated to the crimes charged in the case at bar, (Tr. 1322-23), and whether he had stated to Pollakov that he had "20 years in his suitcase" (Tr. 1299, 1307) (by which he meant he was carrying stolen securities for

which he could so be sentenced), as well as the defense's unsuccessful attempts to question Pollakov whether Gushi had so stated to him, (Tr. 1874-75), would have supported this defense theory. In other words, besides impeaching Gushi, the curtailed evidence would have supported the defense.

Improper restriction of cross-examination and extrinsic impeachment results in prejudicial error where it restricts the defense from presenting its theory by way of such evidence. See *Howard* v. *United States,* 278 F.2d 872 (D.C. Cir. 1960); *Hughes* v. *United States,* 427 F.2d 66, 68 (9 Cir. 1970); *Salem* v. *State of North Carolina,* 374 F. Supp. 1281 (W.D.N.C. 1974). Restriction of the defense right to present evidence violates due process. *Chambers* v. *Mississippi,* 410 U.S. 284, 294 (1973).

B.

Petitioner's position was improperly and prejudicially limited by the court in the jury's presence.

Here, the court not only limited cross-examination as to Gushi's hopes of benefit, (Tr. 1463), and otherwise improperly limited the defense in attempting to demonstrate the extent of his bias via proper cross-examination and extrinsic impeachment, (see pp. 28-38, *supra*); most prejudicially, the court also informed the jury—gratuitously and *sua sponte*—that there was no merit to the defense theory, because he, the judge, and not the government, ultimately decided what bond was set, (Tr. 1405), and what sentence would be imposed. (Tr. 2075)

The court thus substantially and prejudicially limited and impaired petitioner's right effectively to assert to the jury that Gushi's testimony was affected by his interest and bias. This judicial interjection constituted reversible error.

In the words of this Court:

> " 'The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr v. United States, 153 U.S. 614, 626 . . . [1894)], and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach* v. *United States,* 326 U.S. 607, 612 (1946).

See also *United States* v. *Dellinger,* 472 F.2d 340, 386, 390 n.88 (7 Cir. 1972).

Here, the defense theory was that Gushi's testimony should not be credited because his interest and bias were such as to render his testimony against petitioner entirely unbelievable. Two of the principal factors demonstrating such interest and bias would have been—had counsel effectively been permitted to develop them—that Gushi believed that he had already benefited from his decision to cooperate with the government in that his bond was reduced from $1,000,000 to a feasible amount which he in fact had posted,[28] rendering him at liberty rather than in custody, and that Gushi hoped and expected that the government would recommend a light sentence due to his having testified against petitioner.

The trial court's action (Tr. 1405, 2075) effectively precluded the jury from drawing proper inferences favorable to petitioner, as to Gushi's state of mind, which they might have drawn, but for the judge's improper interven-

[28] The court sustained prosecution objections to proper defense questions designed to demonstrate, *inter alia,* that Gushi's bond was reduced at a hearing in the absence of his (Gushi's) attorney, (Tr. 1403), from which the jury properly could draw inferences as to Gushi's state of mind and belief that his "cooperation" ultimately resulted in his release on bond. (See Tr. 1402-05; and see pp. 28-29, 37, *supra.*)

tion.[29] *United States* v. *DeLoach,* 504 F.2d 185 (D.C. Cir. 1974); see *United States* v. *Charles Pfizer & Co.,* 426 F.2d 32, 43-45 (2 Cir. 1973); *cf. United States* v. *Gonzalez,* 488 F.2d 833 (2 Cir. 1973).

Here, the court's comments effectively precluded the jury from drawing the inferences as to Gushi's state of mind, interest, bias and belief which could properly be drawn, both from the manner in which bail was set and from Gushi's expectations as to sentence. By interposing himself as he did, the judge's comments that he alone sets bond and imposes sentence necessarily prevented the jury from giving these matters proper consideration and from drawing permissible inferences therefrom in ultimately determining the most crucial issue in the trial: Gushi's credibility.

• • •

The Seventh Circuit's rulings on the issues within this Point conflict with the foregoing decisions of other Circuits and of this Court.

In answering petitioner's contentions within this Point seriatim, the panel has failed to deal with the realities of the cumulative impact of the entire situation, as required.

It has ignored the reality that petitioner was logistically unable to proceed in the technically preferable method deemed mandatory by the panel, simply because of the patently unfair manner in which the government structured its case.

[29] Indeed, the court's gratuitous comments amount to unsworn testimony by the judge, not subject to cross-examination. The interjections herein complained of are impermissible for that reason as well. Where it is pertinent that a judge's testimony be heard, another judge must be assigned to try the case so that the judge who is to testify can give sworn testimony and submit to cross-examination before a different tribunal than himself. 28 U.S.C. 455. See, *e.g., Halliday* v. *United States,* 380 F.2d 270, 273 (1 Cir. 1967).

This Court should review the cause on certiorari to give full effect to the Sixth Amendment right to confrontation of accused persons on a consistent nationwide basis.

Moreover, certiorari should be allowed to permit this Court to ascertain whether, as to this issue as well, formalities will be allowed to govern the substance of justice.

3.

The jury was improperly instructed as to the federal jurisdictional element on Counts 2 through 7.

To constitute the offense charged in Counts 2 through 7, *i.e.*, violation of 18 U.S.C. 2113(b), the theft must be of money or property "belonging to or in the care, custody, control, management or possession" of a "bank" as defined in sec. 2113(f). See *King* v. *United States*, 426 F.2d 278 (9 Cir. 1970).

It was the government's theory in the case at bar that Purolator—the entity from whose custody, according to the government, the money in question was stolen—was an agent of each of the banks sufficient to render a theft from Purolator a theft from each of the banks.

Assuming, *arguendo*, that this may have been provable, under the elements instructions given by the court, over defense objections, (Tr. 1938-39), the jury was neither permitted to nor called upon to make this necessary factual determination.[30]

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[30] The court instructed the jury as follows:

"Count II charges:

That on or about October 20, 1974, at Chicago, . . .

* * *

[the] defendants herein, did take and carry away, with intent to steal and purloin, money in excess of $100.00, that is, approximately $1,165,204.00, belonging to and in the care, control

(Footnote continued)

The elements instructions, as given, correctly stated an abstract principle of law; however, they did not include other matters necessary in order for that abstract principle to make sense to the jury under the facts of this case. Conspicuously absent was any reference in these elements instructions to Purolator's role as alleged agent of each of the banks;[31] while Purolator was mentioned in this context in the portions of the indictment itself read as a part of the instructions, the jury was *not* charged with the re-

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(Footnote continued)

and management of the Merchandise National Bank of Chicago, a bank whose deposits were then and there insured by the Federal Deposit Insurance Corporation, from the possession of Purolator Security, Incorporated, 127 W. Huron Street, Chicago, Illinois, agent of the Merchandise National Bank;

In violation of Title 18 United States Code, Section 2113(b).

To convict a defendant of this count, you must find beyond a reasonable doubt:

On or about October 20, 1974, the defendant did take and carry away, with intent to steal or purloin, any amount of money in excess of $100.00 that belonged to or was in the care, control or management of the Merchandise National Bank of Chicago;

And, that the Merchandise National Bank of Chicago was a bank whose deposits were then and there insured by the Federal Deposit Insurance Corporation." (Tr. 2239-40)

Identical instructions, differing only in the name of the bank and the amount of money allegedly taken, in conformance with the allegations of Counts 3 through 7, were given with respect to those counts. (Tr. 2240-46)

These instructions as to the elements which the jury must find to convict petitioner upon each of Counts 2 through 7 were government's offered instructions 35 through 40, (Tr. 2187-94), given by the court (Tr. 2239-45) over petitioner's objections. (Tr. 1938-39; 2261).

[31] This "agency" relationship was contested via cross-examination. Thus, it was the jury's role, under appropriate instructions, to make such determination.

sponsibility of making the necessary factual determination, from the disputed evidence in the case, whether or not, as to each of the counts in the 2 through 7 group, theft from Purolator amounted to theft from the bank, so as to confer federal jurisdiction over what otherwise would have been purely a State crime.

Moreover, while the indictment alleged in each of Counts 2 through 7 that petitioner "did take and carry away" the respective sums of money "from the possession of Purolator Security, Inc.," (App. 4-9), the elements instructions given permitted the jury to find petitioner guilty of any or all of those Counts even if they did *not* find, beyond a reasonable doubt, that petitioner "took and carried away" the monies "from the possession of Purolator." All they were told they had to find, to find petitioner guilty of these sec. 2113(b) counts, was that:

> "On or about October 20, 1974, the defendant did take and carry away, with intent to steal or purloin, any amount of money in excess of $100.00 that belonged to or was in the care, control or management of the . . . Bank . . . [named in that count];
>
> And, that the . . . Bank . . . [named in that count] was a bank whose deposits were then and there insured by the Federal Deposit Insurance Corporation." (Tr. 2240).

Instructions can be erroneous, requiring reversal, because under the facts of a particular case they are inadequate, inapplicable or confusing, even though in a vacuum they may correctly state abstract principles of law. See, *e.g., United States* v. *Collier,* 313 F.2d 157, 159 (7 Cir. 1963); *Morris* v. *United States,* 326 F.2d 192, 194-95 (9 Cir. 1963); *United States* v. *Torrence,* 480 F.2d 564, 565 (5 Cir. 1973). In each case the reviewing court reversed for precisely this reason.

Moreover, failure of the trial court to relate the facts of the particular case to the law as stated in its charge can constitute reversible error as well. See *United States* v. *Rosenfield,* 469 F.2d 598, 601 (3 Cir. 1972).[32]

While in a "garden variety" bank theft case, instructions similar to those here objected to would be entirely proper, these instructions are inadequate and confusing in the case at bar, because they left the jury completely at sea in making the essential factual determination as to the necessary jurisdictional element of the case.

The instructions complained of herein had as their principal effect the removal from the jury's consideration of

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[32] While the reviewing court in *Rosenfield* affirmed on the basis that in the uncomplicated factual situation there, no prejudice occurred, the cases relied on by the *Rosenfield* court as mandating reversal for failure to relate the law to the facts in more complicated cases are persuasive support for petitioner's argument herein. See, *e.g., Choy* v. *Bouchelle,* 436 F.2d 319, 325 (3 Cir. 1970) (a civil case, reversed and remanded):

> "The defendant here made no objection to the charge of the court which was purely a legalistic definition of principles . . . but by reason of the factual complexity here involved, we feel it was *plain error* to leave the disposition of the case to the jury under the circumstances which the court did, for if the jury was to have any understanding of the value of the matters adverted to, they should have been discussed by the court in the light of their relevancy to the law involved. . . .
>
> "We consider the charge of the court . . . *totally inadequate in providing legal guidelines to the relevant factual situations here involved,* and though no objection was raised at trial, we conclude our failure to consider this as plain error would be a miscarriage of justice." (Emphasis added.)

In the case at bar, of course, petitioner *did* object, (Tr. 1938-39; 2261); *Choy* is pertinent not only for its result, but also to demonstrate how serious is the error.

the essential jurisdictional element in the case, thereby depriving petitioner of his right to trial by jury on this crucial issue. For this reason as well, the instructions herein complained of require reversal. *United States* v. *Lee,* 483 F.2d 959 (5 Cir. 1973).

Certiorari should be allowed so that this Court may speak to the absolute necessity of adequate instructions as to jurisdictional elements of federal offenses.

4.

Petitioner was improperly subjected to multiple convictions and sentences for essentially a single transaction.

A. Counts 2 through 7.

Each count in the group of counts 2 through 7 charges a violation of 18 U.S.C. 2113(b), theft of various sums of money belonging to each of six separate federally insured banks, from the possession of Purolator Security, Inc. The offense charged in all of these counts is but a single offense; a single theft was perpetrated at the Purolator premises on a single date, constituting a single occurrence.

Count 8, (App. 10-11), dismissed on the government's motion prior to trial, (App. 15), properly charged a single offense in a single count, cumulating the sums of money separately alleged in Counts 2 through 7.

Petitioner was convicted upon each of counts 2 through 7, (App. 15), and received a 10 year sentence upon those counts. (App. 16)

To permit the jury to consider petitioner's guilt or innocence upon all six counts (2 through 7) separately, as part of an indictment also containing several other types of offenses all related to the theft from Purolator, (*i.e.*, conspiracy, use of explosives, and interstate transportation of

stolen money), was prejudicial to petitioner, in that such indictment and trial procedure implied to the jury that he in fact committed more offenses than had actually allegedly been committed, and invited the jury to compromise in a manner agreeable and favorable to the government but detrimental to petitioner. Had the single offense improperly charged in the six fragmented counts (2 through 7) properly been charged in a single count, such as the dismissed Count 8, it would have been more difficult, we submit, for the jury to find petitioner guilty; seeking a compromise verdict—as the jury obviously did—the jury may well have decided to acquit him of such single count, while it found it difficult to acquit him of any or all of the six improperly fragmented charges.

In any event, petitioner may not stand convicted of six offenses upon Counts 2 through 7, since in fact only a single offense was committed, though framed in this highly prejudicial indictment as six separate offenses.

If a person commits a single theft of federally insured bank money, may he separately be charged in different counts for theft of money from each bank account from which money was taken? The question contains its obvious answer; yet, in substance, the procedure here employed is fundamentally no more sensible than this far-fetched hypothetical.

While no case directly in point has been discovered, several analogous legal doctrines clearly indicate the illegality of multiple convictions, and absolutely mandate the illegality of multiple sentences, upon these six counts.

In *United States* v. *Canty,* 469 F.2d 114, 126-27 (D.C. Cir. 1972), the court held, *inter alia,* that defendant could not stand convicted and sentenced — albeit the sentences imposed upon these counts were concurrent—upon each of four counts charging robbery from each of four separate

bank tellers during the course of a single bank robbery. Accordingly, as to the bank robbery counts, the court affirmed conviction of one of the four counts, remanding the others with directions to vacate the convictions. *Id.* at 129. *"There is no doubt here that only one transaction took place . . ." Id.* at 126. (Emphasis added.)

See *Prince* v. *United States,* 352 U.S. 322 (1957); *United States* v. *Leather,* 271 F.2d 80 (7 Cir. 1959); *cf. Heflin* v. *United States,* 358 U.S. 415 (1959); *Bell* v. *United States,* 349 U.S. 81 (1955); *Guffey* v. *United States,* 310 F.2d 753 (10 Cir. 1962).

In short, a single transaction took place. Yet the panel holds that by the same logic whereby theft of multiple mail bags from a single railroad car can constitute multiple offenses, Counts 2 through 7 charged separate crimes because the monies of each banking institution were segregated and identifiable. (App. A, p. 22)

Does this Court agree? And if so, in this case, what if identifiable monies were taken belonging to 100 different banks? Would the Court condone imposition of 100 separate convictions and sentences for this single transaction? What has happened here differs only in degree.

B. Counts 2 through 7 and Count 12.

Similarly, both common sense and congressional history plainly contraindicate imposition of a consecutive sentence upon one convicted of theft for the formalistically separate offense of transportation of the thefted money.

In Count 12, petitioner was charged with the interstate and foreign transportation of stolen money. It was the government's contention that the stolen money alleged to have been transported in Count 12 was part of the money allegedly stolen as charged in Counts 2 through 7.

This Court never has had occasion to determine the propriety of separate convictions and sentences—especially, as here, *consecutive* sentences—for violation of 18 U.S.C. 2113(b) and 2314. The sole Supreme Court case upon which the Seventh Circuit relies, *Blockburger* v. *United States,* 284 U.S. 299 (1932), holding that multiple convictions are permissible where proof of one offense requires proof of a fact which the other does not, may well be inapplicable, this Court apparently having decided *Blockburger* as it did solely because it was a narcotics case. See *Gore* v. *United States,* 357 U.S. 386, 388-91 (1958).

Reasoning underlying *Milanovich* v. *United States,* 365 U.S. 551, 554 (1961), and legislative history revealed in *United States* v. *Sheridan,* 329 U.S. 379, 384 (1946), lend support to petitioner's position that he may not properly stand convicted both of the Count 2 through 7 group and of Count 12. See also *Heflin* v. *United States,* 358 U.S. 415, 419 (1959).

* * *

To resolve important questions of statutory construction and application in the uniform administration of frequently-charged federal offenses, certiorari should be allowed, since this Court has not yet had occasion to address itself to either of these important issues, and the Seventh Circuit's determinations appear far less than satisfactory.

CONCLUSION

For any or all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX

APPENDIX A*

In the
United States Court of Appeals
For the Seventh Circuit

No. 75-1511

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PASQUALE CHARLES MARZANO,

Defendant-Appellant.

Appeal from the United States District Court,
Northern District of Illinois, Eastern Division.
No. 74-CR-806
WILLIAM J. BAUER, *Judge.*

ARGUED DECEMBER 11, 1975 — DECIDED MAY 18, 1976

Before SWYGERT, CUMMINGS, and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* This case arose out of a widely publicized theft of more than three million dollars from the vaults of Purolator Security, Inc. in Chicago, Illinois, sometime Sunday evening or Monday morning, October 20 or 21, 1974. The company was engaged in the business of providing armored car service for the transportation of cash between banks and business establishments.

In November 1974, an indictment was returned against Pasquale Marzano, William Marzano, Ralph Marrera, Luigi DiFonzo, Peter Gushi, and James Maniatis. Count one of the indictment charged these persons with conspiracy to commit various offenses including the theft of money from Purolator Security, Inc. Counts two through

* Majority opinion.

seven charged the two Marzanos and Marrera with taking money belonging to various banks[1] from the possession of Purolator in violation of 18 U.S.C. § 2113(b).[2] Gushi and Maniatis were charged with aiding and abetting in each of these counts. Count eight charged the same persons with the same offenses as counts two through seven but included all the banks in the one count. Count nine charged the Marzanos and Marrera with entering a building used in part as a bank for the possession of money belonging to Merchandise National Bank with the intent to commit a felony in violation of 18 U.S.C. § 2113(a). Gushi and Maniatis were charged with aiding and abetting that offense. Counts ten and eleven charged the Marzanos and Marrera with the use of an explosive in violation of 18 U.S.C. § 844(h)(1) and 18 U.S.C. § 844(i), respectively, and Gushi and Maniatis with aiding and abetting these offenses. Count twelve charged the Marzanos, DiFonzo, and Gushi with transporting stolen money in violation of 18 U.S.C. § 2314.[3]

[1]

Count 2	Merchandise National Bank of Chicago	$1,165,204.00
Count 3	Central National Bank	$ 562,610.00
Count 4	Exchange National Bank	$ 66,500.00
Count 5	Ford City Bank	$ 378,850.00
Count 6	Peterson Motor Bank	$ 10,000.00
Count 7	Metropolitan Bank and Trust Company	$ 19,000.00

[2] 18 U.S.C. § 2113(b) provides:

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

[3] 18 U.S.C. § 2314 provides:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities, or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Maniatis pled guilty to counts one through eight, and the remaining counts against him were dismissed. Gushi pled guilty to all counts except count eight. The Government moved to dismiss counts eight and nine against the remaining defendants, and that motion was granted. William Marzano pled guilty to the remaining counts although the guilty plea to count ten was apparently withdrawn later. Marrera was severed from the other defendants because of a competency question as to him. Pasquale Marzano and DiFonzo were tried before a jury. DiFonzo was found not guilty on all counts; Pasquale Marzano was found not guilty on counts ten and eleven but guilty on counts one through seven and twelve. He is the sole defendant on this appeal and will sometimes herein be referred to as the "defendant."

A detailed recitation of the evidence against Marzano is unnecessary to resolve the issues presented on this appeal. The witnesses against the defendant included Gushi, who testified to much of the planning of the theft; Martin Pollakov, an undercover informant for the Illinois Legislative Investigating Commission (ILIC) who worked at a discount store owned by Gushi while investigating possible fencing operations and who met with defendant and Gushi on several occasions; and Edward Doyle, an agent of the ILIC who posed as Pollakov's friend and worked as a handyman and errand boy at the store. In addition, expert testimony was presented which indicated that paint

[3] (Continued)

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

chips from the containers that Purolator used to store money were found in a van that defendant had been seen driving, although always with gloves, and which had been purchased with funds which had at least partially been provided by him. The most direct evidence was provided by Gushi.

I. Right to Confrontation

Defendant argues that he was deprived of his Sixth Amendment right to confrontation, his due process right to a fair trial, and his constitutional right to present defense evidence because the trial judge unduly limited his cross-examination of Gushi and unduly limited him in presenting extrinsic evidence showing Gushi's self-interest and bias.

The various errors alleged must be considered in the context of the entire trial and in light of their probable cumulative prejudicial effect. Of necessity, however, the errors alleged must be discussed individually.

A. *Gushi's Hopes*

Defendant argues that his counsel was improperly restricted in questioning Gushi about his hopes of avoiding prison. Counsel asked:

> Q. Well, then, it is your present testimony that when you made the statement now "that because of your testimony, people will go to jail," you are also hopeful that if others go to jail you won't. Isn't that true?
> Mr. Breen: Objection.
> By Mr. Echeles:
> Q. You are hopeful of that, aren't you?
> The Court: Sustained.

This question followed a series of argumentative questions. Counsel was permitted to bring out that Gushi was facing 115 years imprisonment by virtue of pleading guilty to the indictment; that while in prison previously, he had attempted suicide because he could not take the prospect of serving more time; that he disliked and feared the prospect of going to prison; that he would like not to go to prison if possible; that he was concerned about his

family if he had to serve more time; and that he hoped his wife would not be prosecuted for offenses which his testimony indicated she had committed. Some of these points were brought out more than once. In closing argument defense counsel argued that Gushi testified as he did to protect his wife from criminal charges and because he "knew" someone would "get him off."

The jury was clearly aware that Gushi had much to lose by not cooperating with the Government and could not have been unaware that he hoped to avoid a prison sentence. We cannot hold that it was reversible error for the court to sustain the Government's objection to a question of doubtful propriety, the answer to which could only have repeated what appears adequately elsewhere in the record.

Defendant argues that the trial judge informed the jury that there was no merit to the defense theory that Gushi was biased and effectively diluted defendant's right to have the jury draw permissible inferences regarding Gushi's credibility. The record does not support this argument.

During closing argument the following colloquy occurred:

> Mr. Echeles:
> . . . .
> Let me show you. He doesn't want to go back to the penitentiary. Yes, I think about suicide. I am facing 115 years when I pled guilty.
> My god, he pled guilty to torching. He pled guilty to the accusations in the indictment, notwithstanding on the witness stand he said he had nothing to do with it because he doesn't care, because he knows somehow Oitzinger, or somebody in the FBI is going to get him off.
> The Court: Don't invade my province.
> Mr. Echeles: It is not your power. It's afterwards, your Honor.
> He doesn't care about pleading guilty even to count and charges to which from the witness stand, notwithstanding his pleas of guilty before Judge Bauer, he didn't do the things he says. He uses words, he uses concepts and ideas as suits him.

The trial judge did not prevent the defense from arguing its theory to the jury. He merely cautioned counsel against arguing that the Government had the power to determine Gushi's sentence. While a defendant has the right to have counsel argue that the jury should draw certain inferences from the evidence, a defendant has no right to have the jury draw incorrect inferences regarding the law. Defendant has not shown that his counsel was prevented from arguing that Gushi had hopes of avoiding prison as a result of his testimony.

The authority cited by defendants is inapposite. In *United States* v. *Dellinger,* 472 F.2d 340 (7th Cir. 1972), *cert. denied,* 410 U.S. 970 (1973), it was held that the trial judge had made rulings during closing argument which were comparatively more restrictive to the defense than to the Government; no such showing was made in this case. Indeed, in the present case, the defense reply brief agreed "that the trial judge's demeanor and patience during this long and hotly contested trial was exemplary." In *United States* v. *Gonzalez,* 488 F.2d 833 (2d Cir. 1973), the trial judge made statements immediately after giving an accomplice instruction which negated the instruction and in effect indicated that the warnings in the instruction did not apply in that case. In *United States* v. *DeLoach,* 504 F.2d 185 (D.C. Cir. 1974), the trial judge prevented defense counsel from arguing that certain factual inferences could be drawn from the evidence.

The attitude and hopes of the witness with regard to his own incarceration or other punishment for his participation could not have been other than obvious to the trier of fact from that which was in evidence. In sum, the trial judge was acting within his discretion in limiting defense counsel's cross-examination and arguments regarding Gushi's hopes. *See United States* v. *Keefer,* 464 F.2d 1385, 1386 (7th Cir. 1972), *cert. denied,* 409 U.S. 983; *United States* v. *Peskin,* 527 F.2d 71, 82-83 (7th Cir. 1975). *Cf. Davis* v. *Alaska,* 415 U.S. 308, 316 (1974).

B. *Bond Reduction*

Defendant argues that his counsel was improperly prevented from bringing out fully the circumstances of Gushi's bond reduction and that his rights were prejudiced by the

trial judge's remarks regarding the bond reduction. Defendant admits that he was allowed to bring out that Gushi's bond was reduced from $1,000,000 to $50,000 in conjunction with a reduction in state court without opposition by the Government after several months of cooperation with the Government. Defendant complains that he was not permitted to bring out the location where the bond was set or posted or that Gushi's attorney was not present at the time the reduction was made.

It was within the discretion of the trial judge to sustain the Government's objection on the grounds of irrelevance to the questions regarding where the bond was set and posted. Counsel argues that the defense need not demonstrate the relevance of possible answers, citing cases such as *Alford* v. *United States,* 282 U.S. 687, 692 (1931), and *United States* v. *Varelli,* 407 F.2d 735, 749-51 (7th Cir. 1969). These cases hold that defense counsel should normally be permitted to inquire as to a witness's address. A witness's address can be highly relevant, *e.g.,* where the witness is in custody, or can lead to other relevant information where an address is not known. In contrast, the location where bond was set has at best marginal intrinsic relevance, and it has not been demonstrated to us that Gushi's answer could have led to other relevant information since defendant's counsel knew the bond had been set in the Northern District of Illinois; indeed, the remarks of the trial judge about which counsel complains reveal that he had set Gushi's bond.

The trial judge interrupted defense counsel when he asked a question implying that the Government had the power to determine when an accused could be released from custody on bond and that it had permitted Gushi to be released due to his cooperation. The judge stated: "Not precisely, Mr. Echeles. I entered the order reducing it without reference to cooperation. . . . The United States Government, in the person of the Department of Justice, does not set bonds. I do." This is a correct statement of the law, and counsel was permitted to show there was no opposition to the reduction by the Government. Counsel argues that the court's comments diluted defendant's right to have the jury draw permissible inferences bearing on Gushi's credibility. This is not the case. The remarks only

prevented the jury from drawing the erroneous inference that the Government has the power to raise or lower bonds.

Defendant further argues that bringing out the fact that Gushi's attorney was not present would have shown the extent of the Government's lack of opposition. The evidence was already clear that the Government made no objection whatsoever to the reduction. Again the trial court was acting within the limits of its discretion in refusing to allow the introduction of this marginally relevant evidence.

C. *Extrinsic Evidence*

Defendant argues that he was improperly precluded from introducing testimony on various events showing reasons why Gushi might be biased. Evidence of prior illegal acts not resulting in convictions is not admissible to show a witness's general lack of character. Such evidence is admissible to show bias. *United States* v. *DeLeon*, 498 F.2d 1327, 1332-33 (7th Cir. 1974). *Accord, United States* v. *Lester*, 248 F.2d 328, 334 (2d Cir. 1957). The circumstances surrounding such acts are not relevant, or at least it is within the discretion of the trial judge to limit testimony regarding surrounding circumstances. *United States* v. *DeLeon, supra* at 1332-33.

Where bias is to be proved by showing a prior statement, a foundation must be laid by calling the statement to the witness's attention so that the witness may explain or deny the statement. *Smith* v. *United States*, 283 F.2d 16, 20-21 (6th Cir. 1960), *cert. denied*, 365 U.S. 847 (1961); IIIA Wigmore, *Evidence* § 953 (Chad. rev. 1970); McCormick, *Evidence* § 40 at 80 (2d ed. 1972) (majority rule); 3 J. Weinstein and M. Berger, *Weinstein's Evidence* ¶ 607[03] at 607-32-33 (1975) (indicating this view should prevail under the Fed. R. Evid.). The reasons for this rule are closely analogous to the reasons for the rule requiring a foundation for impeachment by prior inconsistent statements.

There appears to be much conflict in the state courts regarding this rule. *Annot.*, 87 A.L.R.2d 407 (1963). This annotation, § 8, and Wigmore, *supra* at 801, indicate that federal authorities conflict on this point, but this conclusion appears unwarranted.

The annotation cites *Ewing* v. *United States*, 135 F.2d 633 (D.C. Cir. 1942), *cert. denied*, 318 U.S. 776, for the proposition that a foundation is not required. The case in that regard is somewhat ambiguous, but any indication to that effect is clearly dicta because foundation questions had been asked. The district court in *United States* v. *White*, 225 F. Supp. 514, 520 (D.D.C. 1963), *rev'd on other grounds*, 349 F.2d 965 (D.C. Cir. 1965), held that *Ewing* was not controlling; the court of appeals did not comment. We note that even in *Ewing* the court held that it would be objectionable to permit a witness to testify as to a cause of bias before the allegedly biased witness testified. We believe that the current position of the Second Circuit is represented by *United States* v. *Kahn*, 472 F.2d 272, 281-82 (2d Cir. 1973), *cert. denied*, 411 U.S. 982, which follows *Smith*, and that therefore *Hoagland* v. *Canfield*, 160 F. 146 (S.D.N.Y. 1908), and *United States* v. *Schindler*, 10 F. 547 (S.D.N.Y. 1880), cited in the annotation, have no continuing validity on this point. *Comer* v. *Pennsylvania R.R. Co.*, 323 F.2d 863 (2d Cir. 1963), cited by Wigmore, involved evidence of conduct or a situation indicating possible bias rather than a statement showing bias. Whether a different rule should be applied where conduct rather than a statement is involved is not before this court. Many state courts draw this distinction. *Annot., supra.*

In this case it is abundantly clear that defendant was not prejudiced by the trial judge's application of the foundation rule. Before Pollakov was examined, a colloquy occurred during which the trial judge first inquired whether Pollakov would be available after Gushi testified and then ruled that he would not allow Pollakov to be questioned to show Gushi's cause for bias until after Gushi had testified and had been questioned concerning possible bias. Defense counsel expressed disagreement with the court's interpretation of the law, which we hold was correct, but stated that he understood the ruling and would comply with it.

The admission of extrinsic evidence is not exclusively conditioned on a witness's denial of making prior statements showing bias. A sufficient foundation is laid if the witness testifies that he does not remember making the statement or if he gives an equivocal response. *E.g.*, McCormick, *supra* at *81*.

When defense counsel sought to present extrinsic evidence showing Gushi's bias through Pollakov, the district judge required counsel first to ask his questions outside the presence of the jury. Defendant argues that this was error.

He bases this argument principally on *United States* v. *Bohle,* 445 F.2d 54 (7th Cir. 1971). In *Bohle* defense counsel sought to impeach a key Government witness by proving that she had made prior inconsistent statements. The trial court required defense counsel to ask the witness foundation questions outside the presence of the jury. When the witness denied making the statements, the judge ruled that the questions could not be asked in the presence of the jury unless someone was present who could testify that the witness had made the statements. This court held that the procedure constituted reversible error because it enabled the witness to eliminate any reaction of surprise before being confronted with the inconsistent statements in front of the jury. The court noted that attorneys are officers of the court and that it hoped the occasions of putting prejudicial material before a jury without intending to make use of the foundation laid would be minimal. Nevertheless, it stated that regulation may sometimes be necessary, especially in a criminal case where such an abuse could not be remedied by reversal of a tainted victory for the defense.

In this case the trial judge did not require a voir dire of Gushi outside the presence of the jury but allowed proper foundation questions to be asked.[4] Then before allowing possibly prejudicial material to be brought before the jury by suggestive questions a second time, he required substantiation of the various allegations by the voir dire procedure. We hold that the trial judge was acting well within his discretion in so doing.

The defendant argues that the rationale of *Bohle* applies to this case because the jury should have been allowed to evaluate the impeaching testimony. This argument attacks the judge's decision to exclude most of the material uncovered in the voir dire hearing rather than the propriety of having the hearing outside the presence

[4] Defendant's arguments regarding restrictions placed on the cross-examination of Gushi are discussed *infra.*

of the jury. The information revealed in the voir dire hearing is discussed in detail *infra;* but the short answer to defendant's arguments is that the trial judge was acting within his discretion to limit the introduction of marginally relevant prejudicial evidence. *E.g. United States* v. *Peskin, supra.* This is especially true in this case where the form of the questions asked to elicit the information suggests misconduct far greater than that supported by the evidence.

The defendant also suggests that the voir dire procedure was improper because the questions would have the effect of impeaching Pollakov by reflecting on his ability to remember and relate prior events. The value of the questions as impeachment of Pollakov must be considered de minimis in light of the strong prejudice to the Government which would have resulted from the questions defendant's counsel sought to ask.

We now turn to the specific instances in which the defendant argues error occurred.

Defendant argues that he was improperly precluded from showing that Gushi had threatened Pollakov and his family and that he should have been permitted to utilize the transcript from Marrera's bond hearing to refresh Gushi's recollection of such threats. Gushi was never asked whether he had threatened Pollakov or his family. Gushi was asked: "Mr. Gushi, are there other criminal offenses which you committed for which you have not yet been arrested, about which the Federal government knows? Do you know?" The defense's theory is that this question is sufficient because threatening a witness is a crime under 18 U.S.C. § 1503. During the voir dire Pollakov only gave limited support to the existence of these threats. He testified that Gushi had once made a statement to his wife which he had thought might have been a threat and which he had reported to the authorities. He testified that he was unsure whether it was a threat.

The district court did not abuse its discretion by excluding Pollakov's testimony. The defense did not lay an adequate foundation to introduce it. The question quoted above and ones similar to it lacked requisite specificity. They did not call the incident in which counsel was in-

terested to Gushi's attention, and therefore Gushi had no opportunity to explain his remarks. This defect cannot be considered merely technical because of Pollakov's uncertainty as to whether Gushi's remarks were a threat. There was no basis for using the transcript of the Marrera bond hearing to refresh Gushi's recollection when the remarks had not been called to his attention.

Defendant argues that his counsel was improperly prevented from questioning Doyle about Gushi's admission to Pollakov that he had once killed a man named Tony. Doyle's testimony occurred before Gushi testified. He had no personal knowledge regarding Gushi's alleged confession but was questioned regarding what he had been told by Pollakov. Gushi denied telling anyone that he had killed Tony although he admitted that he had been questioned by both state and federal authorities regarding such a killing. During the voir dire Pollakov testified that Gushi had once told him that years ago he had killed a man named Tony. The trial court instructed defense counsel that he could question Pollakov regarding Gushi's statements about the murder of Tony, and Pollakov repeated the essence of his testimony before the jury. Thus the defense had ample opportunity to bring the facts regarding Gushi's statement before the jury. Doyle's testimony would only have become relevant if Pollakov had denied that Gushi had made the statements, but he did not.

The defendant argues that his counsel was improperly prevented from questioning Pollakov concerning Gushi's possession of $13,000,000 of stolen securities. The defense theory is that this would not only have tended to show Gushi's bias by showing another crime with which Gushi could have been charged but would also have supported a theory of the defense that the defendant did not know the source of the money transported, *i.e.*, the money could have come from a source other than the Purolator theft. Doyle testified that a score meant any type of criminal enterprise and that he had knowledge, though not personal knowledge, that Gushi was working on a score involving $13,000,000 of stolen securities. Gushi denied ever carrying stolen securities in a suitcase from New York or ever telling Pollakov that he had 20 years in a suitcase, meaning that

if he were caught with the suitcase, the stolen securities which it contained could cost him a sentence of 20 years. Gushi testified that he had attempted to get between one and twenty million dollars of discount securities[5] for transfer to a man in France. On voir dire Pollakov testified that one time Gushi had come to the store and had said that he was carrying 20 years in his briefcase. He further testified that although there had been a lot of talk about the securities, Gushi had never actually said "stolen"; that it was his assumption that the securities were stolen; that he had told Doyle about the incident and had made reference to the securities as stolen; and that he had never heard Gushi refer to the term "score" as a synonym for "stolen." Defendant urges that his counsel should have been permitted to present Pollakov's testimony to the jury. While it might not have been error for the trial court to admit this testimony, it was not an abuse of discretion to exclude it. Doyle had already testified regarding the transaction. To some extent Pollakov's testimony weakened Doyle's unequivocal indication that Gushi was involved with $13,000,000 of stolen securities. This provided a sufficient basis for impeachment. It is within the trial court's discretion to determine the extent to which details of a witness's misconduct are brought before the jury. *United States* v. *DeLeon, supra.*

Defendant argues that it was error for the trial judge to preclude Pollakov from testifying about a threat by Gushi to kill a cash register salesman. Gushi denied ever making such a threat but admitted that he had told a cash register salesman to leave his store. The defense had a right to prove such a threat was made if it could, but on voir dire Pollakov testified that Gushi did not threaten the salesman's life though he yelled and screamed at him and chased him out of the store. He testified that Gushi never touched the salesman but said that two persons in the store had grabbed Gushi. Pollakov admitted that he might have told Doyle that Gushi threatened to kill the salesman. Since the defense could not substantiate its allegations of the threat, it was not error for the court to refuse to permit the matter to be raised before the jury a second time. In addition at most the threat

[5] The exact meaning of the term, "discount securities," and the details of the scheme which Gushi explained are not relevant to this appeal.

would have been a state crime, and we have held that the United States Attorney's lack of power to cause or prevent a prosecution is a factor that may be considered by a district judge though it is doubtful whether that fact alone would be a sufficient basis to exclude such evidence. *United States* v. *Amabile*, 395 F.2d 47 (7th Cir. 1968), *rev'd on other grounds*, 394 U.S. 310 (1969). *United States* v. *Masino*, 275 F.2d 129 (2d Cir. 1960), is not to the contrary. In that case it was held that it was error to exclude evidence showing that a state court charge had actually been quashed at the behest of the assistant United States Attorney prosecuting that case. *Id.* at 131-32.

Pollakov testified that Gushi told him he was tired of being broke and that he was going to engage in a big score and that he was going to go in with carbines and rifles and if any cop got in his way he was going to "take him out." He also testified that Gushi said he would have to "take four guys out of the way." Defendant complains because the trial judge did not permit Pollakov to respond to questions as to whether Pollakov interpreted the first statement to mean that Gushi was intending to kill a policeman or to explain the second statement. This was not error. The jury was as able as Pollakov to determine Gushi's meaning. Failure to allow Pollakov to answer these questions did not render this attempt to impeach Gushi meaningless as defendant argues.

The defendant argues that his counsel should have been permitted to ask Pollakov if Gushi told him that he was going to go over and shake down a Jew who owed Al Wainer, the financier of Gushi's store, $15,000. Gushi admitted that he was thinking of going over and trying to collect money for Wainer, but he denied using the words counsel suggested or making the statement in the way counsel made it. On voir dire Pollakov supported Gushi's version of the incident. It was not error for the trial court to refuse to permit counsel to imply misconduct which could not be established. He had a right to ask Gushi to lay a foundation, but he had no right to bring this potentially prejudicial material before the jury a second time.

Gushi testified that he told Maniatis to lie if anyone asked him what had been done with the truck that was

used in the theft. Counsel for defendant then asked him whether his purpose was to protect Maniatis. The trial judge sustained the Government's objection. It is unclear why this was in any way relevant, especially in light of Gushi's admission in response to the next question that he lied when it suited his disposition.

The other evidentiary arguments which defendant makes are clearly without merit. He argues that his counsel was prevented from presenting evidence in support of his theory of the case, which is merely a repetition of the arguments made concerning the $13,000,000 of securities, and, apparently, that he was in some way limited in educing evidence about three separate scores. Gushi denied telling Pollakov that he was involved in three separate scores. The Government states in its answering brief that Pollakov was never asked about three scores. We have found no reference to three scores, and the defendant's reply brief sheds no light on the matter. The limitations on the cross-examination of Doyle were proper because when Doyle was questioned, Gushi had not testified; and Doyle admitted that he had no personal knowledge about most of the matters in which counsel was interested. Defendant indicates that counsel was somehow restricted regarding an alleged threat by Gushi to kill Doyle. Gushi testified that to the best of his recollection he never threatened Doyle, but defendant makes no showing that he was ever limited from presenting evidence about the matter. Similarly there is no showing that counsel was ever prevented from introducing evidence about a $135,000 score. Gushi was cross-examined extensively regarding such a score, and defense counsel sought to imply that it referred to criminal activities. Gushi testified that the score referred to a brokers' fee he had earned with five others and that his share was $27,500.

D. *Summary*

The defendant in his reply brief complains that the Government in responding to his brief treated each of his contentions as though it were in a vacuum without regard to the cumulative effect upon the jury's ultimate determination. Of necessity, we have had, as did the

Government, to address ourselves to the individual contentions. Having done so, we have no difficulty in concluding that the cumulative effect of the court's rulings did not prevent the accomplishment of the defense objective of portraying fully the deficiencies of Gushi's character as a person and, more significantly, as a witness. We come away from an examination of the transcript with the distinct feeling that the defense was more interested in demonstrating that Gushi was really a very "bad guy," than it was in showing that he was biased or testifying untruthfully just to save his own skin. That the effort was not entirely without success may to some extent be explicative of what might appear to be the rather unaccountable acquittal of DiFonzo on the transportation count. That the defendant on the other hand was convicted cannot, in our opinion, stem from the fact that the jury was prevented from focusing on more than adequate criteria for evaluating the ultimate credibility of Gushi's testimony. Considering this lengthy trial as a whole, we find it free from reversible evidentiary error. The defendant's right to a fair trial and his right to confront witnesses were not violated.

II. Seizure of Evidence on Grand Cayman Island

Within ten days of the Purolator theft, the FBI had apparently traced the defendant and DiFonzo to Grand Cayman Island. The details of their trip from Chicago to Grand Cayman are not relevant to this appeal. Defendant and DiFonzo were ultimately taken into custody by Detective Superintendent Derrick Tricker of the Grand Cayman police and placed on a plane for Miami. At the time they were taken into custody, money and various other items were taken from them. Defendants moved to suppress the use of these items as evidence. After an evidentiary hearing, the district judge denied the motion on the grounds that the FBI agents on the Island acted merely as observers and did not substantially participate in the arrest and seizure of evidence. The court made no finding as to whether the agents or Tricker had probable cause to arrest on the Island.[6] If this court found that

[6] The opinion of the district court on this issue appears at 388 F. Supp. 906.

the basis of the district court's ruling was improper, the remedy would not be to reverse defendant's conviction and order a new trial, as defendant argues, but would be to remand for an evidentiary hearing on whether probable cause to arrest existed. For the purposes of this opinion, we will assume that neither Tricker nor the FBI agents were aware of probable cause to arrest the defendant on October 30, 1974, in connection with the Purolator matter.[7] The defendant does not appear to contend that the arrest or search incident thereto was illegal under Cayman law.

In *United States* v. *Issod*, 508 F.2d 990, 994 (7th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975), this court held that if information is obtained in a search by a private individual absent probable cause, the information is usable if Government agents did not participate in the search. The same standard applies when foreign law enforcement personnel obtain evidence through such a search. Whether the Government participated so as to render the search Government action must be determined by examining the facts surrounding the search. *United States* v. *Newton*, 510 F.2d 1149, 1153 (7th Cir. 1975).

We must accept the factual findings of the district court on this issue unless they are clearly erroneous. The district court found that Superintendent Tricker agreed to meet two FBI agents who were attempting to locate defendants, that Superintendent Tricker informed the agents that they could not carry weapons on the Island or interrogate or take into custody the defendants, that he further informed them that they had no jurisdiction but that they could accompany him on his investigation, and that the agents did not take the defendants into custody or even speak to the defendants about the crime. Tricker took the defendants into custody for various infractions of Grand Cayman law and asked the defendants to board a plane bound for Miami after determining that the FBI was willing to pay the cost of defendants' airfare. He testified that the defendants had a choice about going to Miami but that he did not tell them so and that if the defendants had indicated that they wanted

[7] It would not be technically accurate to say that probable cause did not exist as a warrant had been issued in the United States on the day of the arrest. That fact, however, was not known at the time of the arrest.

to go somewhere other than Miami, he would have had "to review the situation." From our examination of the suppression hearing transcript, we come away with the impression that Tricker jealously guarded his prerogatives and reached his own decisions about what to do with the information which the FBI had provided to him. The district judge found that even if the agents had desired to act without jurisdiction, Tricker would not have allowed it.

The defendant argues that but for the information provided by the FBI, he would never have been taken into custody on Grand Cayman. This is perhaps a fair reading of the testimony; nevertheless, the law is clear that providing information to a foreign functionary is not sufficient involvement for the Government to be considered a participant in acts the foreign functionary takes based on that information. *Stonehill* v. *United States,* 405 F.2d 738, 746 (9th Cir. 1968), *cert. denied,* 395 U.S. 960, (1969); *Gold* v. *United States,* 378 F.2d 588 (9th Cir. 1967); *Birdsell* v. *United States,* 346 F.2d 775, 782 (5th Cir. 1965), *cert. denied,* 382 U.S. 963; *Shurman* v. *United States,* 219 F.2d 282 (5th Cir. 1955), *cert. denied,* 349 U.S. 921; *Sloane* v. *United States,* 47 F.2d 889 (10th Cir. 1931). FBI agents were present with Superintendent Tricker at various times during his investigation and search, but there is no evidence that they took an active part in interrogating or searching the suspects or in selecting evidence to seize. Mere presence of federal officers is not sufficient to make the officers participants. *Stonehill* v. *United States, supra; United States* v. *Johnson,* 451 F.2d 1321 (4th Cir. 1971), *cert. denied,* 405 U.S. 1018 (1972). Under the circumstances of this case the coincidence of these factors is insignificant. *See United States* v. *Johnson, supra.*

In *Stonehill* the Ninth Circuit held that before the Fourth Amendment applied, the participation of federal agents must be so substantial as to convert the search into a joint venture. The participation involved in *Stonehill* was substantially greater than that involved in this case, but the court held that the evidence obtained was admissible. We need not adopt the Ninth Circuit's standard at this time but only need to hold that the involvement of the Government agents in this case was too insignificant

for them to be considered participants in the actions of the foreign police official.

Citing *Knoll Associates* v. *FTC,* 397 F.2d 530 (7th Cir. 1968), defendant argues that Tricker's purpose to help the United States is sufficient reason to prohibit the use of evidence he seized in violation of the Fourth Amendment. In *Knoll* this court held that documents which had been stolen by a private citizen for the purpose of assisting the FTC in a proceeding then pending were inadmissible. This court relied on *Gambino* v. *United States,* 275 U.S. 310 (1927). In *Gambino* the Supreme Court held inadmissible the fruits of a search which had been made by a state officer solely for the purpose of fulfilling the duty he believed he had under state law to enforce the national prohibition act. This court has distinguished *Knoll* where the items challenged were rightfully acquired for purposes independent of helping the Government and where the items challenged were acquired eight months prior to contact by the Government. *United States* v. *Billingsley,* 440 F.2d 823 (7th Cir. 1971), *cert. denied,* 403 U.S. 909, *United States* v. *Harper,* 458 F.2d 891 (7th Cir. 1971), *cert. denied,* 406 U.S. 930 (1972). Recently this court made it clear that a mere purpose to assist the Government does not transform an otherwise private search into a Government search. *United States* v. *Newton, supra,* 510 F.2d at 1153. See also *Gold* v. *United States, supra.* The defendants violated Grand Cayman law, according to Tricker, and that is the reason for which he arrested them. That he might also have intended to help the United States is not a sufficient reason to treat his actions as those of United States agents.

In *Burlay* v. *United States,* 383 F.2d 345 (9th Cir. 1967), *cert. denied,* 389 U.S. 986, a case similar to the one before us, the Ninth Circuit stated:

> The Fourth Amendment does not, by its language, require the exclusion of evidence and the exclusionary rule announced in *Weeks* [v. *United States,* 232 U.S. 383 (1914),] is a court-created prophylaxis designed to deter federal officers from violating the Fourth Amendment. Neither the Fourth nor the Fourteenth Amendments are directed at Mexican officials and no prophylactic purpose is served by applying an exclu-

sionary rule here since what we do will not alter the search policies of the sovereign Nation of Mexico. *Id.* at 348.

No purpose would be served by excluding the evidence taken by Superintendent Tricker and turned over to the FBI in Grand Cayman.

Defendant argues that even if the Government was not a participant in Tricker's actions, an illegal seizure took place when he turned the items taken from the defendant and DiFonzo over to the FBI on Grand Cayman. Superintendent Tricker's action in turning the items over to the FBI was totally voluntary. Thus, no seizure took place. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 484 *et seq.* (1971).

III. Motion to Discharge

The defendant and DiFonzo moved to be discharged from custody on the grounds that the district court had no jurisdiction over them because they had been illegally brought to the United States from Grand Cayman Island. The district court denied this motion, and defendant argues that this was error.

It has long been held that due process has been satisfied when a person is apprised of the charges against him and is given a fair trial. The power of a court to try a person is not affected by the impropriety of the method used to bring the defendant under the jurisdiction of the court. *Frisbie* v. *Collins,* 342 U.S. 519 (1952); *Ker* v. *Illinois,* 119 U.S. 436 (1886). Once the defendant is before the court, the court will not inquire into the circumstances surrounding his presence there. *United States ex rel. Calhoun* v. *Twomey,* 454 F.2d 326, 328 (7th Cir. 1971). The Supreme Court recently reaffirmed the continuing validity of the *Ker-Frisbie* doctrine. *Gernstein* v. *Pugh,* 420 U.S. 103, 119 (1975).

We are aware of only one case in which a court departed from this doctrine. In *Toscanino* v. *United States,* 500 F.2d 267 (2d Cir. 1974), the Second Circuit remanded the case for an evidentiary hearing to determine the truth or falsity of defendant's allegations that he was forcibly abducted by or at the direction of United States officials. Toscanino had allegedly been subject to brutal torture

before being returned to the United States, and United States officials allegedly had taken part in the interrogation and torture. The Second Circuit has since made clear that *Toscanino* should not be read as abolishing the *Ker-Frisbie* doctrine in that circuit and that it will only apply *Toscanino* where it is shown that Government agents took part in outrageous conduct which shocks the conscience of that court. *United States ex rel. Lujan* v. *Gengler,* 510 F.2d 62 (2d Cir. 1975), *cert. denied,* 421 U.S. 1001; *United States* v. *Lira,* 515 F.2d 68 (2d Cir. 1975), *cert. denied,* ..... U.S. ..... (1976). *See Rochin* v. *California,* 342 U.S. 165 (1952).

In part II of this opinion we held that the United States agents did not significantly participate in events on Grand Cayman Island. No facts have been alleged or proved which could be termed shocking to the conscience. *Toscanino* is therefore inapposite. We need not decide whether we would follow *Toscanino* if similar facts were presented. We note that the Fifth Circuit appears to have rejected *Toscanino,* and the Ninth and Tenth Circuits have rejected similar arguments. *United States* v. *Winter,* 509 F.2d 975, 987 (5th Cir. 1975), *cert. denied,* ..... U.S. ..... (1976); *United States* v. *Herrera,* 504 F.2d 859 (5th Cir. 1974); *United States* v. *Cotten,* 471 F.2d 744, 747-49 (9th Cir. 1973), *cert. denied,* 411 U.S. 936; *Hobson* v. *Crouse,* 332 F.2d 561 (10th Cir. 1964). None of these cases, however, appear to have involved as outrageous conduct as was involved in *Toscanino.*

IV. A Single Offense or Multiple Offenses

A. *Counts Two through Seven*

Defendant was charged under 18 U.S.C. § 2113(b) with taking money belonging to six different federally insured banks. A separate count was charged for each bank whose money was taken.[8] Defendant argues that it was error to

[8] A factual issue at trial was whether the takings charged in counts two, three, and four were of money belonging to the named banks or of money belonging to others. This issue was not raised in the briefs filed with this court but was discussed at oral argument. Though we might properly consider the issue waived because it was not raised in the briefs, we have examined the record on this point and find that sufficient evidence was presented to the jury for it to conclude the money belonged to the banks.

charge multiple counts since all the money taken was from the Purolator vault. In issue is what Congress intended to be the allowable unit of prosecution under section 2113(b). It is now clear beyond question that the different subsections of 2113 do not create different crimes but merely prescribe alternate sentences for the same crime depending on the manner in which the crime was committed. *Wright* v. *United States,* 519 F.2d 13, 15 (7th Cir. 1975), *cert. denied,* ..... U.S. ....., 96 S.Ct. 285. Defendant was only charged with offenses under one subsection, section 2113(b).

Robberies of multiple tellers within a bank are not separate takings within the meaning of the statute. *United States* v. *Fleming,* 504 F.2d 1045 (7th Cir. 1974); *United States* v. *Canty,* 469 F.2d 114 (D.C. Cir. 1972). Nevertheless, the rationale of *Fleming* and *Canty,* which we reaffirm, leads us to conclude that the indictment properly charged multiple offenses.

A single occurrence may constitute multiple offenses if Congress so intends. *Ebling* v. *Morgan,* 237 U.S. 625 (1915), cutting multiple mail bags taken from the same railroad car; *Barringer* v. *United States,* 399 F.2d 557 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1057 (1969), robbery of two persons at the same time. In *Fleming* this court stated:

> The crime is bank robbery, not personal assault. . . . Congress' concern was penalizing the robbery of the institution, perpetrated by whatever means, and not penalizing the robbery of each individual teller. 504 F.2d at 1054. See *United States* v. *Canty, supra,* 469 F.2d at 126.

In this case the money taken belonged to multiple banks. That the money was all taken from Purolator's vault is irrelevant. Congress was concerned with protecting bank money. A separate crime may be charged for each institution whose money is taken. Since the money at Purolator was kept segregated in separate containers, there was no question as to whose money was taken and whose money was left as there would have been if the money had been commingled.

B. *Count Twelve*

Defendant argues that he could not properly be convicted of taking property under section 2113(b) and transportation under section 2314. In *Blockburger* v. *United States,* 284 U.S. 299 (1932), the Supreme Court stated the standard by which to determine whether one offense or multiple offenses resulted from particular conduct:

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Id.* at 304.

The relevant elements of section 2113(b) are the taking and carrying away with the intent to steal more than $100 which belongs to a federally insured bank. The relevant elements of section 2314 are the transportation of $5000 or more in interstate or foreign commerce knowing it to have been stolen. Section 2113(b) thus requires a taking, but section 2314 does not. Section 2314 requires transportation in commerce, but section 2113(b) does not. Under the *Blockburger* test, therefore, conduct even though violating both sections constitutes two offenses since each requires proof of a fact which the other does not.

This holding does not conflict with *Helfin* v. *United States,* 358 U.S. 415 (1959), or *Milanovich* v. *United States,* 365 U.S. 551 (1961), relied on by defendant. In *Helfin* the Court held that in enacting section 2113(c), Congress did not intend to increase the punishment for the robber of a bank but rather intended to provide punishment for those who receive loot from a robber. Section 2314 does not refer to receiving. The primary purpose of section 2314, as indicated in *United States* v. *Sheridan,* 329 U.S. 379 (1946), would be thwarted if we were to engraft a receiving requirement on to it. In *Sheridan* the Court stated that the purpose of a predecessor of section 2314 was to aid the states in punishing criminals whose offenses were complete under state law but who utilized channels of interstate commerce to escape.

Thus, a second actor cannot be required to violate section 2314. *Milanovich* also involved statutes prohibiting taking and receiving.

Defendant relies on *Sheridan* in arguing that section 2314 is directed only at violators of state law who transport goods in interstate commerce, not violators of federal law. The Court in *Sheridan* did not purport to be indicating the exclusive purpose of the statute. It indicated the purpose of the statute to answer a defendant's argument that he could not be held liable under it because the fraud he allegedly committed was complete at the time the transportation occurred. The language of the statute does not limit its scope to violators of state law.

We therefore conclude that the defendant may simultaneously be convicted of violating sections 2314 and 2113(b) as charged.

V. Jury Instructions

A. *Credibility of an Accomplice*

The district court gave the following instruction on the credibility of accomplices:

> An accomplice is one who voluntarily participates in the execution or the planning of a crime.
>
> If the jury believes that the witness Peter Gushi directly participated as an accomplice in the commission of the offense charged then his testimony should be closely examined and weighed with great care.
>
> If the jury believes the testimony of an accomplice to be true beyond a reasonable doubt, that testimony *may be* sufficient to convict the defendant even though it is not corroborated by any other evidence.

With the exception of a change of the word "is" to the words "may be" (italicized above), this is the standard LaBuy instruction on accomplices. LaBuy, *Manual on Jury Instructions*, 33 F.R.D. 523, 577 (1963). Defendant argues that the jury should have been instructed that the testimony of an accomplice witness should be received with great caution and scrutinized with great care.

This court recently held that the trial judge has discretion to formulate the exact language by which to convey to the jury the thought that accomplice testimony must be received with great caution. *United States* v. *Rajewski*, 526 F.2d 149, 161 (7th Cir. 1975). The words "suspicion" and "caution" were used in *Rajewski;* but on the facts of this case, we find no error.

In the conference on jury instructions, defendant's counsel sought to have the trial court call Gushi "a person who admitted his participation in the crime" rather than an "accomplice." The instruction he submitted contained the caution language quoted above, but this was not the basis on which he argued to the trial judge that his instruction was preferable to the Government's.

In *United States* v. *Belcher*, 448 F.2d 494 (7th Cir. 1971), this court faced almost the identical argument to the one presented in this appeal. In *Belcher* the defendant requested an instruction similar to the one sought by the defendant in this case. This court held that it was not error for the court to use an instruction similar to the LaBuy instruction when the lower court's attention had not been directed to the particular difference in language between the requested instruction and the one given. *Belcher* controls our decision in this case.

Defendant argues that the last sentence of the instruction given improperly advised the jury that it could convict on the accomplice's testimony alone. Gushi did not testify as to all the elements of the crimes charged; but in the context of the complete instructions, we cannot conceive that the jury could have understood the instruction other than to indicate that if the jury believed Gushi on the points to which he testified, his testimony might be sufficient on those points. To so charge was not error.

Finally, defendant argues that since the purpose of the instruction was to protect the defendant, he had a right to have no instruction given on the subject. He analogizes to cases holding that unless a defendant requests an instruction indicating that the jury should not consider defendant's failure to take the stand or indicating that the jury should limit its consideration of defendant's prior convictions to credibility, it is error so to instruct.

United States v. *Glazer*, 110 F.Supp. 558, 563 (E.D. Mo. 1952); *Illinois* v. *Gibson*, 133 Ill. App. 2d 722, 272 N.E.2d 274, 277 (1971). Defendant did not make this argument to the trial court. Instructions on prior convictions and a defendant's failure to take the stand have the potential of prejudicing him by singling out sensitive evidence. The instruction given in this case is much less likely to prejudice defendant. We hold that it is not error for a trial judge to give an accomplice instruction without a request by a defendant at least where, as in this case, the defendant does not make known his preference that no instruction be given.

B. *Jurisdiction*

Concerning counts two through seven, the trial judge instructed the jury:

> To convict a defendant of this count, you must find beyond a reasonable doubt:
>
> On or about October 20, 1974, the defendant did take and carry away, with intent to steal or purloin, any amount of money in excess of $100.00 that belonged to or was in the care, control or management of the . . . Bank . . . [named in that count];
>
> And, that the . . . Bank . . . [named in that count] was a bank whose deposits were then and there insured by the Federal Deposit Insurance Corporation.

In the indictment it was charged that the defendants took money belonging to and in the care, control and management of the various banks from Purolator, an agent of the various banks. The defendant argues:

> Conspicuously absent was any reference in these elements instructions to Purolator's role as alleged agent of each of the banks [footnote omitted] . . . the jury was *not* charged with the responsibility of making the necessary factual determination, from the disputed evidence in the case, whether or not, as to each of the counts in the 2 through 7 group, theft from Purolator amounted to theft from the bank so as to confer federal jurisdiction over what otherwise would have been purely a state crime. (Emphasis in original.)

This argument is without merit. The heart of the crime charged and the federal jurisdictional nexus was the taking of money belonging to or in the control of a federally insured bank. 18 U.S.C. § 2113(b). Purolator's status as an agent, independent contractor, or otherwise was totally irrelevent to the crime charged. Under the court's instructions the jury must have found that federally insured bank money was taken. This is all that was necessary to convict under the statute. The agency language in the indictment is surplusage though there can be no doubt from the evidence in the case that the jury found the money was taken from Purolator. We note that the indictment was read to the jury as part of the instructions. Additional instructions would have been required had count nine not been dropped before trial because to convict under that count, the jury would have had to find that Purolator was in part a bank. We express no opinion on the legal sufficiency of that theory.

VI. Purolator as a Branch Bank

The defendant argues that Purolator, under the Government's theory, constituted a "branch bank" of each of the banks named in Counts 2 through 7; that branch banking is against Illinois law and public policy; and that comity requires that the special federal protection afforded federally insured banks, *i.e.*, making thefts therefrom federal crimes, be withheld.

This argument is completely frivolous. For the counts tried it was not the Government's legal theory that Purolator was a branch bank. Purolator's legal status was irrelevant. Second, there is no evidence here sufficient for us to find that Purolator was a branch bank. Finally, acceptance of the defendant's argument would require acceptance of an unstated premise that branch banking is a greater public policy evil under Illinois law than bank theft. We do not so find.

VII. Disparity of Sentence

Defendant argues that the sole conceivable reason defendant received a greater sentence than his codefendants who pled guilty was that he chose to stand trial.

Defendant was sentenced to five years on count one, ten years on each of counts two through seven and twelve. The sentences on counts one through seven are concurrent with each other, but the sentence on count twelve is consecutive with the other sentences. William Marzano was sentenced to five years on count one, seven years on counts two through seven and five years on count twelve, all sentences to run concurrently. This court has held that disparity between a sentence given a defendant who pleads guilty and to another who is convicted after trial is not, standing alone, enough to establish that the latter was punished for exercising his constitutional right to stand trial. *United States* v. *Wilson*, 506 F.2d 1252, 1259 (7th Cir. 1974). No more than sentence disparity is shown in this case. In addition there was evidence from which the district judge could have inferred that the defendant was the organizer of the scheme. Also, William Marzano executed a power of attorney to a Chicago attorney covering money stolen from the premises of Purolator deposited in banks on Grand Cayman. Gushi, of course, testified for the Government. The district court did not abuse its discretion by imposing a harsher sentence on defendant.

VIII. Conclusion

We have considered the other contentions of the defendant and find them without merit. The conviction of the defendant, for the reasons hereinbefore set out, is

AFFIRMED.

APPENDIX B*

SWYGERT, *Circuit Judge*, dissenting. Defendant Marzano's conviction should be reversed and the case remanded to the district court for a new trial because Marzano's Fourth Amendment rights were violated by the illegal seizure from him of evidence while he was on Grand Cayman Island. Since the circumstances of the seizure are highly significant, they must be stated fully.

On October 30, 1974 Federal Bureau of Investigation Agents Francis J. Pieroni and Patrick Farrell flew to Grand Cayman and were met at the airport on prearrangment by Derrick S. Tricker, Superintendent in charge of the Criminal Investigation Branch of the Grand Cayman Island police force. The agents told Tricker that DiFonzo and Marzano were fugitives from justice in a four million dollar Chicago bank burglary. Tricker was told that the agents' purpose was "to establish liaison with the police over there [Cayman Island] to investigate a case" arising in the United States. No warrants had been issued up to that time for the arrest of either defendant. The FBI agents furnished Tricker with photographs of the defendants and said they wanted him to find "these two fellows."[1]

Initially the agents accompanied Tricker to the Grand Cayman immigration office. There they were told that on October 22 a private plane had arrived on the island. The immigration officer identified the photograph of DiFonzo and informed the officers that when a large piece

*Dissenting opinion.

[1] Tricker testified:

Q. You were asked for assistance by the Federal Bureau of Investigation?
A. I was.
Q. The assistance was to find Pasquale Marzano and Luigi M. Di Fonzo; isn't that right?
A. That is correct, sir.
• • •
Q. Now directing your attention to October 30, had you previous knowledge that two officers of the FBI were going to come to Grand Cayman?
A. I received a telephone call about an hour before their arrival from Miami saying two officers were going to arrive on the island.
Q. That phone call was from the FBI in Miami?
A. That is correct.
Q. Did they tell you anything other than two agents were going to arrive on a plane in Grand Cayman?
A. Because of the insecurity —
Mr. Troy: I object.
The Court: He may answer.
By The Witness:
A. They told me the officers would tell me what it was about when they arrived.
• • •
Q. Now when they arrived, what was the conversation which you had with them?
• • •
A. They told me that they had grounds to believe that two persons, or possibly three, that had been involved in a burglary involving over four million dollars had come to the island.
By Mr. Breen:
Q. Did they have any photographs with them?
A. They had photographs of two persons who they said were Marzano and Di Fonzo, Luigi Di Fonzo and Charles Marzano.

of luggage opened on the custom's counter "it was crammed with U.S. dollar bills which were bound up."

After the visit to the immigration office, Tricker, accompanied by the agents, visited six hotels on Grand Cayman Island in search of DiFonzo and Marzano. Tricker testified that on the second visit to the Holiday Inn he found the parties he "was looking for" registered under assumed names. At about 9:30 that evening Tricker accompanied by agent Pieroni went to the island airport.[2] At about 10:00 P.M. Tricker said he saw DiFonzo and Marzano at a departure gate and, after identifying himself, asked them to "give me their names and addresses and to identify themselves." He then asked the two men to accompany him to a room in the airport. Tricker told them that they were then under arrest for "refusing to give their names and addresses." Agent Pieroni was present in the room at the time. DiFonzo and Marzano were never formally charged with refusal to give their names. At the time of their arrest, each had a ticket for an air trip to Costa Rica in the name of "Stewart."

DiFonzo and Marzano were taken into custody and driven to the police station in a police car accompanied

[2] Earlier in the evening, Agent Pieroni had dinner with Superintendent Tricker and his wife. The agent testified as follows:

Q. During the course of that dinner, there was some conversation relative to checking the planes that leave Grand Cayman Island?
A. Yes.
Q. And that, "We will check all of the planes, because we might catch them leaving."
A. That was Mr. Tricker's idea, yes.
Q. Right. You went with him?
A. I was with him.
Q. And went with him?
A. And went with him.
Q. From the place where you dined to the airport, some how many miles away?
A. I have no idea, three or four miles.
Q. Now you weren't there as a private citizen. You were there as an agent of the Federal Bureau of Investigation?
A. That is right.
Q. Then, of course, you were present at the time Tricker arrested the two accused?
A. I was in the airport terminal, yes.
Q. You could hear what he said to them?
A. I did not.
Q. You did not?
A. I was 50 feet from him.
Q. Fifty feet?
A. Yes, sir. He approached them alone.

by Tricker and Agent Pieroni. There they were searched in Tricker's office by Detective Inspector Evans of the Grand Cayman police. Tricker and the two FBI agents were present during the search. (Agent Pieroni specifically requested to be present.) "Everything they had on them was taken," according to Tricker. This included $9,300 which Marzano had in his pocket, $13,000 which DiFonzo had in a briefcase, a piece of paper "with something written on it," and two air tickets in the name of Stewart.[3] The agents looked at the items and helped inventory them.

DiFonzo and Marzano were placed in a police lockup overnight and the next morning Tricker took them to the

[3] Tricker testified:

A. They were searched in my office, I said.
Q. By whom?
A. By Detective Inspector Evans.
Q. Evans?
A. In my presence.
Q. What did he take from them?
A. Everything they had on them, as we do all prisoners.
Q. Well, what was that?
A. I didn't list the property, but I think Marzano had something like $9,300 on him. Di Fonzo had something like $13,000, a briefcase, two air tickets in the name of Stewart, a piece of paper with something written on it, five cases —
Q. What was written on it?
A. I can't recollect now.
Q. Do you have it here?
A. I haven't, no.
Q. Did you give it to the U. S. Attorney?
A. Not the U. S. Attorney. I gave it to the FBI.
Q. Who?
A. We put them back in the luggage.
Q. Who did you give them to in the FBI?
A. We put it back in their luggage and the luggage was put on the plane for them. What happened to it after that, I don't know.

• • •

Q. What happened to the money?
A. That was handed to Special Agent Farrell.
Q. Because he was going back on the same plane?
A. If we had lost $23,000, because I sent it through the normal fashion in the hold of the aircraft, I might have been held responsible.
Q. You never considered giving it back to the people you took it from, did you?
A. No, because I had reason to believe —
Q. No, no, please. You did not consider giving it back to them. Yes or no?
A. I am telling you why I did not do it.
Q. No, please be responsive to my question.
A. I did not consider giving it back to them.
Q. So you gave it an FBI man —
A. That is correct.

airport and put them on an airplane bound for Miami. Agent Farrell rode in one car with Marzano and two officers of the island police. Agent Pieroni rode in a car with Tricker and DiFonzo. The items inventoried during the search including the $23,000 were handed to agent Farrell and the defendants' baggage were placed on the plane by the police. The FBI agents supplied and paid for the plane tickets to Miami for DiFonzo and Marzano and sat next to them in the plane during the trip. A Grand Cayman police officer also accompanied the defendants on the trip to Miami. His fare was paid by the FBI.[4]

[4] Agent Pieroni testified:

Q. Now, look. you did not say to Tricker, did you, "I would like to get these guys off the island. Will you help me?"
A. I did not.
Q. You did not say, "Send them to the United States so I can arrest them"?
A. No, sir.
Q. Did you know that they had a ticket for Costa Rica in their pockets?
A. Yes.
Q. You supplied the tickets for Miami, didn't you?
A. Yes, I did.
Q. Did you pay for the Caymanian police to accompany him to the plane and to the United States?
A. Yes, sir.
Q. You did not give any indication to Tricker at all that you wanted them back in the States?
A. No, I didn't.
Q. You did not ask the defendants if they wanted to go to Miami, did you?
A. No, sir.
Q. Did you ask them if they wanted to go to Costa Rica when they had their tickets and their baggage was on the plane?
A. I had no conversation with these gentlemen, except for the coffee and sandwiches episode.
Q. Now you took $26,000 from Mr. Tricker, didn't you?
A. No, I didn't.
Q. The fellow with you?
A. Yes.
Q. In any event, you took that, along with personal papers, in a valise, right?
A. Yes, Agent Farrell did.
Q. Do you still have those in your custody?
A. Do I still? I don't know.

Agent Farrell testified:

Q. Now did you see two tickets for Costa Rica in the personal belongings of the accused?
A. In the personal belongings of the accused?
Q. Yes.
A. No. Two tickets of that description were given to me by Superintendent Tricker.
Q. By who, Tricker?
A. Yes, sir.

Sometime on October 31, after the arrest and search, the FBI learned that warrants had been issued for the arrest of DiFonzo and Marzano in the United States. This information was passed on to Tricker. Upon arrival in Miami the two were immediately rearrested, this time by federal agents. The items seized in the search were handed by Agent Farrell to the FBI "case" agent, Richard Gerrity, in Miami. The money was counted by the two agents. The inventory list of the items seized was furnished to the United States Attorney in Chicago. The items in question were the subject of the motion to suppress. At trial they were admitted into evidence.

[4] (Continued)

Q. That was before the tickets for Miami were purchased?
A. I presume so, yes, sir.
Q. What time of the day or night did you know that they were returning to Miami?
A. It was on the 31st day at breakfast, about 8:15.

• • •

Q. All right. Did you take charge of the baggage or did you give it to Gerrity?
A. At what point? When we arrived in Miami?
Q. Yes.
A. No, I just kept charge of a small attache case. The rest was picked up by other agents from the plane.
Q. You rode in which car on the way to the airport, by the way, with the Caymanians and the defendants?
A. Mr. Marzano and two officers of the Cayman police.
Q. He was under arrest?
A. Who was under arrest, Mr. Marzano?
Q. Yes.
A. He was under arrest the previous evening. At least, that is what Mr. Tricker told me. I do not know what his status was the next day.

• • •

Q. Would you have let them get out and leave, if they would?

• • •

A. I would have no jurisdiction to prevent him from leaving.

By Mr. Troy:

Q. You would have let him leave?
A. He is bigger than I am.
Q. Were you present when there was some conversation about where the defendants were going from the police station?
A. At what time?
Q. Do you remember any conversation relative to their going to court rather than to the airport?
A. No, sir.
Q. You don't.
As soon as they stepped off the plane in Miami, they were handcuffed, right?
A. I don't recall whether it was as soon as. I was not a part of the —
Q. Did you let them get up and move about in the plane?
A. I did not prevent him. I did not allow him.

In ruling on the motion to suppress the trial judge made the following findings:

> There appears to be no serious dispute as to facts surrounding the defendants' return to the United States. In no way did the United States Government illegally or forcibly abduct the defendants from the British West Indies. In fact, the evidence is manifestly clear that the Federal Bureau of Investigation played little or no part in the return of the defendants to the United States. A review of the evidence indicates that the defendants' return to the United States resulted principally from the efforts of one Grand Cayman police officer, Detective Superintendent Derrick Tricker.
>
> In summary, Supt. Tricker testified that he was aware of the fact that the defendants were present on the Island and had in their possession a large quantity of American currency. When contacted by the F.B.I. he agreed to meet two agents of the Bureau who were attempting to locate the defendants. However, Supt. Tricker admonished the agents upon arriving on the Island that they could not carry weapons (prohibited under Island law) nor could they interrogate or take into custody the defendants. As he testified 'I informed them that they had no jurisdiction but allowed them to accompany me in my investigation.' At the hearing the F.B.I. agents totally corroborated Supt. Tricker's testimony. The agents did not take the defendants into custody nor even speak to the defendants about the crime committed and the ensuing investigation by American authorities. No evidence to the contrary was offered.
>
> On the morning of October 31 Supt. Tricker asked the defendants to board a plane bound for Miami. He had previously taken defendants into custody for various infractions of Grand Cayman law. At no time did the defendants resist boarding the flight for Miami. On no occasion did agents of the F.B.I. actively involve themselves in the process whereby the defendants returned to the United States. Even if the F.B.I. agents had wanted to arrest, illegally kidnap, or forcibly abduct the defendants, it was clear that Supt. Tricker would not permit such actions since the American agents were without any form of authority or jurisdiction on the Island. Indeed, as Supt. Tricker made imminently clear by his testimony, he was responsible for defendants' return to the United States, not the F.B.I. agents. The agents throughout the time in question were mere observers.

The trial judge clearly erred in finding that the FBI "played little or no part in the return of the defendants to the United States, . . . that on no occasion did agents of the F.B.I. actively involve themselves in the process whereby the defendants returned to the United States, [and] . . . . The agents throughout the time in question were mere observers." Rather, the evidence is manifestly clear that the agents were not mere observers. They actively instigated the search for DiFonzo and Marzano on the island, and they participated, in any real sense of that term, in the search for the defendants, their arest, the search and seizure, and in their return to the United States.[5]

The defendant is correct in arguing

> But for the instigation of the FBI, defendant would never have been arrested and searched on Grand Cayman Island.
>
> But for the aid of the FBI in supplying Tricker with defendant's photograph, no arrest could have been made.
>
> But for the presence of the FBI and information supplied by the FBI, the local authorities would not have seized defendant's property (including money, plane ticket, personal papers) and refused to return it to defendant.

---

[5] Tricker testified:

> A. Five minutes later, Special Agent Farrell arrived. At no time did either of these agents say anything. They seemed extremely worried. Special Agent Farrell said to Special Agent Pieroni, "Should I inform them of their rights?"
>
> I pointed out to them informing them of their rights under American laws on the island had no bearing on the case whatsoever.
>
> Agent Pieroni testified on the same subject:
>
> A. Yes. When Farrell arrived, he asked me if Mr. Tricker had advised them of their rights.
>
> Mr. Tricker heard this and responded that it was the Cayman Islands. He had cautioned them under his own law and that the American advice-of-rights method does not apply there.

A reading of the testimony of Superintendent Tricker and Agents Pieroni and Farrell leaves the indelible impression that these three at the hearing made a deliberate, studied effort to place the responsibility on Tricker for the arrest, the search and seizure, and the return of the defendants and to disassociate the FBI agents from the adventure.[6] The stark facts show otherwise.

[6] Some of the excerpts from the record are instructive. Tricker testified:

A. I took them to the local airport to put them on an airplane.
Q. Accompanied by the FBI?
A. They were catching the same flight.

Agent Pieroni testified:

Q. How many phone calls to your superiors did you make while you were down there?
Mr. Breen: Which time?
Mr. Troy: The first time.
By The Witness:
A. The first time? I don't know.
By Mr. Troy:
Q. More than one?
A. Yes.
Q. Did you call the office every day?
A. Yes.
Q. Did they give you instructions as to how to proceed?
A. No.
Q. Did you tell them how it was proceeding?
A. Yes.
Q. Did you tell them that there was a joint Caymanian-Bureau effort to find the defendants?
A. Excuse me, a joint what?
Q. Caymanian-Bureau effort to find the defendants?
A. I told them what information had been developed down there since we were there, through Mr. Tricker. I kept them informed, yes.

• • •

Q. All right. Did you suggest to Tricker at that time or at any time subsequent to that, prior to the defendants leaving the island, that you would like to get them back to the United States?
A. That I would like to get them back to the United States?
A. That I would like to get them back?
Q. Yes.
A. No, sir.
Q. Tricker just came to you and said, "I am going to put them on the next plane to Miami"?
A. Yes, he did.
Q. You had no conversation, or anybody else in your company, had no conversation with Tricker relative to doing the same?

• • •

Q. Did you advise him of information that you had about Luigi Di Fonzo and Pasquale Charles Marzano?
A. Yes.
Q. What did you tell him?
A. I first gave him the general facts surrounding the theft and I furnished him with the names of Charles Marzano, Anthony Marzano, Luigi Di Fonzo, their descriptions and photographs.

The majority discusses a number of precedents to draw subtle distinctions as to when official involvement is or is not sufficient to invoke Fourth Amendment protection. But the law is not cloudy when the involvement is as clear as it is in this case. In *Reid* v. *Covert*, 354 U.S. 1, 5-6 (1956), the Supreme Court, speaking through Mr. Justice Black, delineated the basic reach of the Bill of Rights with respect to citizens of the United States when abroad. There Mr. Justice Black wrote:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power

[6] (Continued)

Q. Did he give you any information with respect to your position on the island?
A. Yes. He told us at the outset that we were not to interview anyone without him being present and that he would conduct any interview, even when he was present and that we had no official authority on the island.

Agent Farrell testified:

Q. Let me ask you this: You were present during the search, when Tricker made the search or whoever made the search?
A. It was two other officers that conducted the inventory or search or whatever it was.
Q. You were there?
A. That is correct.
Q. Did you go through any of the personal papers of the accused?
A. No, sir.
Q. You did not touch a thing.
A. Not to my recollection, unless I stepped over the luggage or something.
Q. Did you open the luggage?
A. I did not, no.
Q. Did you thumb through the things in the luggage a little?
A. No.
Q. Did you take the numbers of the money, maybe?
A. No, sir.
Q. You did not look the money over at all?
A. I saw it.
Q. Didn't you look through it to see if it said Purolator on it or anything?
A. No, I did not.
Q. All right. Now you never participated in the search whatsoever; is that right?
A. That is correct, sir.
Q. All right. Now you never asked any questions?
A. Not in reference to the search.
Q. You did not ask any questions of the accused either?
A. That is correct.
Q. No interrogation?
A. I asked whether they would like cream in their coffee.
Q. But no interrogation?
A. No interrogation.

> and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.

The majority of the panel in this case allows foreign officials to hand evidence against the defendants to federal agents on a "silver platter." The cases dealing with this doctrine decided prior to the Supreme Court's decision in *Elkins* v. *United States*, 364 U.S. 206 (1960), which excluded evidence seized illegally by state officials and handed on a "silver platter" to federal officers, do present situations analogous to that before us. Those cases clearly indicate that the evidence seized in this case should be suppressed.

The Fourth Amendment does not, of course, apply to foreign officials and evidence obtained in violation of that amendment by such officials. If the "silver platter" cases are followed, the evidence would be admissible in a federal court *unless* the purpose of the illegal search was to obtain evidence of a federal offense, *Gambino* v. *United States*, 275 U.S. 310 (1927), or *unless* federal officials participated in the search, *Lustig* v. *United States*, 338 U.S. 74 (1949); *Byers* v. *United States*, 273 U.S. 28 (1927). If the federal officials "had a hand" in the search, "before the object of the search was completely accomplished," it becomes a joint operation, and the "federal official must be deemed to have participated in it." This was the holding in *Lustig* and is the law that must be applied to the facts of this case. When so applied there can be but one answer. The FBI actively participated in the illegal search and seizure. Accordingly, the motion to suppress should have been granted.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
June 28, 1976

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

No. 75-1511 vs.

PASQUALE CHARLES MARZANO, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois Eastern Division
No. 74-CR-806
William J. Bauer, *Judge*

On consideration of the petition of the defendant- appellant, Pasquale Charles Marzano, for a rehearing by the court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the majority of the panel having voted to deny a rehearing,*

IT IS ORDERED that the petition of the defendant-appellant for a rehearing in the above-entitled appeal be, and the same is hereby denied.

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* Judge Swygert voted to grant the petition for rehearing.